Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

79-1171

No. ————

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner, State of Minnesota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota which affirmed the declaration of the Minnesota District Court, Second Judicial District, that the State of Minnesota may not, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, prohibit the sale of milk in nonreturnable, nonrefillable plastic containers.

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court issued on September 7, 1979 is not yet reported. The opinion and dissent are set out in Appendix A, *infra*. The Judgment and Order of the State District Court affirmed, in part, by the Minnesota Supreme Court are unpublished and are set out in Appendix B, *infra*.

JURISDICTION

The Opinion of the Minnesota Supreme Court was filed on September 7, 1979. A timely petition for rehearing was denied and judgment entered on October 31, 1979. In this case, the Minnesota Supreme Court, the highest state court in Minnesota, held that Minn. Laws 1977, ch. 268 is repugnant to the Equal Protection Clause of the Fourteenth Amendment, United States Constitution. The jurisdiction of this court is invoked pursuant to 28 U.S.C.A. § 1257(3) (1968).

QUESTION PRESENTED

Is a state statute banning the use of nonreturnable plastic containers for milk sales because of their adverse environmental impact invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it does not prohibit or compel the elimination of another type of milk packaging which may also have an adverse environmental impact?

THE STATUTE IN QUESTION

The 1977 Session of the Minnesota Legislature duly enacted Minn. Laws 1977, ch. 268, codified as Minn. Stat. §§ 116F.21, 116F.22 (hereinafter "the Act"). That act provides:

> Section 1. [116F.21] MILK: PLASTIC CONTAINERS: STATEMENT OF POLICY. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.
>
> Sec. 2. [116F.22] PROHIBITIONS. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.
>
> Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.
>
> Sec. 3. This act is effective July 1, 1977.

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[1] Hereinafter, the term "plastic container" unmodified will refer to the nonreturnable, nonrefillable, rigid or semi-rigid container prohibited by section 2 of Minn. Laws 1977, ch. 268.

[2] Although the Act was effective July 1, 1977, the effective date of the prohibition was delayed for one year by Minn. Laws 1977, ch. 455.

Thus the Act prohibits retail sale in Minnesota of milk in rigid or semi-rigid, throw-away plastic containers as a step in discouraging use of single use containers and encouraging the use of reusable containers. The Act would also permit the use of flexible plastic pouch containers.

STATEMENT OF THE CASE

This action challenging the constitutionality of the Act was commenced on September 29, 1977, in Ramsey County District Court. On November 29, 1977, the State of Minnesota (hereinafter "the State") moved for an order dismissing the complaint. This motion was denied and trial was held from March 15 through March 21, 1978.

The plaintiffs fell generally into two categories: those involved in the production and sale of plastic goods and associated equipment, and those involved in the packaging and sale of milk.

The first group includes:

1. The Society of the Plastics Industry, Inc., a trade association of plastics interests.
2. Phillips Petroleum Company, a multi-national petro-chemical company.
3. Hoover Universal, Inc., a manufacturer of plastic container equipment.
4. M-H Packaging Systems, Inc., a custom molder of plastic containers in Minnesota.

The second group includes:

1. Clover Leaf Creamery Company, a Minnesota dairy.
2. Marigold Foods, Inc., a Minnesota dairy.
3. Wells Dairy, Inc., an Iowa dairy.
4. Weber & Barlow Stores, Inc., a retail grocery company.

At trial substantial evidence was introduced by all parties concerning the history and current status of milk packaging nationally and in the State of Minnesota and in the Province of Ontario, Canada.

For many years, both in Minnesota and nationally, the returnable glass bottle was the predominant container for consumer milk sales (T. 355).[3] Subsequently, a paperboard container, made from woodpulp coated with paraffin initially and later coated with low density polyethylene, gained in popularity. By 1960, the paperboard container predominated (T. 76). In the early 1960's, the nonreturnable, plastic container began to appear as a significant container in the gallon size.[4] Sales in such containers have increased to the present time nation-wide. Presently, plastic containers represent about 30 percent of the national market (T. 76). It is estimated that the plastic container will occupy over half the dairy market in the next ten years, if unchecked (T. 77). The increase in plastic container sales nationally has brought about a corresponding reduction in sales in returnable containers (T. 76).

For reasons of convenience, milk consumers favor nonreturnable containers over containers which have to be returned (T. 78). They consider the plastic container to be more convenient than paper because the paper container is awkward to handle, may leak or break open and will not reseal (T. 78, 357, 450). Returnable plastic containers may have, or could be designed to have similar convenience advantages over paper (T. 357-58).

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[3] "T" refers to the Trial Transcript.

[4] The asserted interest of respondents and the focus of trial evidence related to the gallon-size container. Unless otherwise qualified, reference in this brief to a particular milk container is intended to refer to the gallon size.

While the plastic container has been a major factor in the national market for a number of years, it is a relatively recent phenomenon in Minnesota (T. 295). Prior to 1977, Marigold Foods, Inc. (which sells the majority of its milk out of Minnesota (T. 458-460)) was the only Minnesota dairy producing plastic containers for milk sales (T. 459).

During 1976, numerous Minnesota dairies began to take steps toward the in-house production of plastic containers for the sale of milk (T. 628). By late 1976, a number of Minnesota dairies had placed tentative orders for machinery to be used in the production of such containers (T. 254, 259-63; Def. Ex. 1).

The plastic container is manufactured by a blow-mold process from plastic resin made from oil or natural gas feedstocks. Machinery for the manufacture of the container costs $220,000 or more for one machine. A 4-head 350 R2 machine produced by Hoover Universal, Inc. is capable of producing approximately 28 containers per minute—a 6-head machine, 42 to 48 per minute (T. 259, 350). Estimates of the cost of in-house production ranged from 5 1/2 cents to 9 1/2 cents per container (T. 301, 353, 432, 435, 450).

There is substantial incentive for a machine purchaser to maximize plastic container production in order to reduce per unit cost (T. 266, 436-37).

The resource and environmental impact of various milk packaging systems was derived from information developed by the Province of Ontario and data compiled by the Midwest Research Institute in a study performed for the United States Environmental Protection Agency and published in a final report of the Agency released August, 1977, entitled: *Resource and Environmental Profile Analysis of Five Milk Container*

Systems (hereinafter "MRI Report") which was introduced in evidence.[5]

While all parties relied on the MRI Report, plaintiffs' reliance was selective. Their evidence at trial centered primarily upon efforts to discredit data in the report indicating that the impacts of the one-way plastic container were more adverse than those of the one-way paper container in the areas of energy use and post-consumer solid waste. While plaintiffs' efforts were directed to environmental and resource comparison of the plastic and paper containers, the evidence plainly demonstrates that both the plastic and paper containers have much higher environmental and resource impacts than alternative returnable and pouch containers.[6] The record also shows that, at the present time the plastic container is produced from oil and natural gas feedstocks (T. 305-06, 313) while the paper container is produced, except for the low density polyethylene coating, from renewable wood resources (T. 40).

The District Court declared that the Act: (1) deprived plaintiffs of substantive due process in violation of the Fourteenth Amendment to the United States Constitution and Minn. Const. Art. I, § 7; (2) deprived plaintiffs of equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution; and (3) constituted an unreasonable burden on interstate commerce contrary to U.S. Const. Art. I, § 8.

On appeal the Minnesota Supreme Court (hereinafter sometimes referred to as the "Minnesota Court") affirmed the district court in declaring the Act void in that it constitutes a

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[5] Plaintiffs' Exhibit I. Table 2 of that report reflecting the summary data of the various containers studied is reprinted in Appendix C.

[6] See Table Appendix C, *infra*.

denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. No other state or federal constitutional provision was cited by the Minnesota Supreme Court.

The Minnesota Supreme Court majority's holding is based upon its determination that paper containers (which are not prohibited) are not proved to be environmentally superior to plastic nonrefillables[7] and that the ban on plastic containers will not, in itself, lead to the use of environmentally superior containers. Thus the court concluded that the classification of the Act (i.e., the prohibition of the plastic container without prohibiting the long established paper container) was not rationally related to any legitimate state interest.

The Minnesota Court ignored the State's argument that the legislature, in determining whether to ban both plastic and paper outright, could consider the relative economic and social disruption which would result from a ban on either or both containers. Furthermore, the court did not consider the proposition that the legislature could reasonably act on the knowledge of an impending large scale movement to plastic in major markets and the absence of any indication that any similar movement was pending to increase a commitment to paper packaging.[8]

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[7] While recognizing that plastic containers consume nonrenewable oil and natural gas, the court indicated that the amount consumed was too small to recognize.

[8] The Minnesota court simply states that this point is illusory absent some evidentiary showing that the legislature will later ban also the paper container.

REASONS FOR GRANTING THE WRIT

I. THE MAJORITY DECISION OF THE MINNESOTA SUPREME COURT IS IN CONFLICT WITH THE EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT.

The majority opinion of the Minnesota Supreme Court declares the Act invalid solely upon federal equal protection grounds. In so holding, however, the Minnesota Court did not follow the standards set forth by this Court in numerous cases. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Even assuming, *arguendo*, that the Minnesota Court was correct in its conclusion that the plastic container which is banned is no worse environmentally than the paper container which is not banned, the proper standard under the above-cited cases does not require the simultaneous prohibition of all conduct which may produce the same type of damage. As pointed out in the case of *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949):

> And the fact that New York City sees fit to eliminate from traffic this kind of distraction *but does not touch what may be even greater ones in a different category*, such as the vivid displays on Times Square, is immaterial. *It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.*

Id. at 110 (emphasis added).

More recently in *Vance v. Bradley*, 440 U.S. 93 (1979) this court said:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the political process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Id. at 97 (footnote omitted).

As pointed out by the dissent of Justice Wahl of the Minnesota Supreme Court, adherence to these standards would have compelled the Minnesota Court to uphold the Act as constitutional.

Regardless of the relative position of plastic and paper nonreturnables as environmental villains, it is undisputed that plastic and paper nonreturnables are, environmentally, and in terms of resource conservation, the two worst containers by a wide margin.

The record also shows that the plastic container was a relative newcomer in comparison to paper containers, and at the time the statute was passed the plastic container was just beginning to penetrate major markets in the state.[9] Numerous dairies were on the verge of making substantial capital investments in the plastic system.[10]

Plainly, there is an important government interest in channeling private investment into areas which may result in resource conservation, energy saving or environmental benefit.[11] There is a concomitant interest in deterring investment in processes which are deleterious to the environment and wasteful of natural resources. By deterring capital investment in the plastic container system, the Minnesota legislature may be seen as channeling milk packaging innovation

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[9] T. 458-60.
[10] T. 628.
[11] *C.f.*, 26 U.S.C.A. § 44C (Supp. 1979), 42 U.S.C.A. §§ 5901, 6851, 6881 (1977).

toward either returnable or pouch containers which would be much superior to either the plastic or paper container in terms of solid waste disposal and energy use.

Therefore, even if the plastic and paper containers are equally disadvantageous environmentally, the prohibition of the plastic container has a rational relationship to the public purpose of guiding dairy packaging practices away from a path which serves only convenience without any environmental or resource benefit.

II. THE PRINCIPLES INVOLVED IN THIS CASE ARE OF BROAD IMPORTANCE BOTH WITHIN AND OUTSIDE THE STATE OF MINNESOTA.

While it is plainly the function of this Court to stand as final guardian against abuses of legislative power, it is also important for the Court to assist in assuring that the legitimate will of the people may be carried out through the actions of their elected legislative bodies where that action does not contravene constitutional safeguards. As this Court noted in *Parham v. Hughes*, 441 U.S. 347 (1979):

> In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures.

Id. at 351.

Both the nation and its several states are currently beset with extremely important and complex problems which have no simple solution. Plainly, this is true in the areas of environment and energy usage. While the ultimate solutions to such problems may lie at the national or world levels, it is

vitally important that state governments do what they can to alleviate such problems or to prevent them from becoming more severe or more entrenched. To perform this function effectively, however, it is vital that state legislatures be allowed the full measure of latitude and discretion permitted by the Constitution.

As discussed above, this Court has repeatedly held that the legislature may proceed one step at a time in dealing with difficult and complex problems. Furthermore, in an area of economic regulation not involving fundamental rights, a legislative act must not be struck down merely because a court does not believe it will achieve its full goal or because a court may feel its policies are unwise. It was logical for the Minnesota legislature to conclude that it would be detrimental to the goal of fostering reuseable packaging to permit the Minnesota milk industry to make widespread substantial long-term commitments to a new throw-away system which rivals, if it does not exceed, the existing paper system in resource and environmental detriment. The fact that this nonproliferation concept was indeed pertinent to the legislature's action is demonstrated by the statements of Senators Alan Spear and William Luther on the floor of the Minnesota Senate May 20, 1977.

> Senator Spear: * * * It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another nonreturnable system with all the investment and all of the vested interest that that is going to involve to begin.

Plaintiff's Exhibit J, Full Senate Floor Discussion, 70th Legislature, May 20, 1977 at 6.

> Senator Luther: * * * the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. * * * There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.

Id. at 2.

The Minnesota Supreme Court majority, however, determined that federal equal protection does not permit this form of step-by-step approach. The Minnesota Court would instead require that all undesirable packages be eliminated at once or none may be eliminated.

The unwarranted restriction thereby placed upon the legislature is readily apparent. Arguably the legislature could prohibit no act however detrimental so long as any alternative act which produces similar detriment remains unprohibited.

In the context of this case this means that the State must allow the plastic container to become entrenched in the market unless it simultaneously moves to prohibit the long-used paper containers. In other contexts it may mean that a dangerous substance may not be prevented from coming on the market unless all existing harmful alternatives are simultaneously banned.

The ramifications of permitting the decision of the Minnesota Court majority to stand are multifaceted. First, the decision in Minnesota will be asserted as authority in the courts of other states which may attempt any form of packaging or other regulation.

Furthermore, and perhaps more importantly, the rationale set forth by the Minnesota Court may predictably be used to stalemate legitimate legislative action prior to passage. Passage or even serious consideration of a bill is often blocked by an argument that the bill would be unconstitutional. When such an argument is supported by the holding of a state supreme court, the argument becomes extremely persuasive, particularly within the same state. If the decision in this case stands as a legitimate application of constitutional law, it can well be used to block passage of legislative efforts at piecemeal resolution of any problem. The presence of the Society of the Plastics Industry, Inc., a nation-wide trade organization, as a party to this case virtually assures that the Minnesota Court's holding will be brought to bear in any proposal involving plastic packaging throughout the country.

Thus, the danger of this case is not limited to the fact that the Minnesota Court will continue to pursue an erroneous theory of equal protection or that courts of other states may be persuaded to follow the Minnesota Court. A greater danger lies in the likelihood that legitimate legislative efforts will be aborted without any opportunity for judicial scrutiny.

Current environmental and energy problems have brought under scrutiny many hitherto unregulated areas of business. Consumer packaging is one area in which many questions are arising concerning resource conservation and environmental impact. The fact that the U.S. Environmental Protection Agency commissioned the MRI study of milk containers, along with other studies relating to packaging demonstrates the national interest in packaging as an element of solid waste and of resource consumption. Undoubtedly, other states will, in the future, consider various types of packaging regulation

which are based upon the desire to check the growth of solid waste and prevent unnecessary diversion of scarce resources.[12] It is of great importance that states considering such legislative actions have before them authoritative and properly circumscribed standards against which to measure the scope of their authority to guide industry into actions responsive to environmentally responsible and conservation motivated activities.

The Minnesota Legislature perceived a packaging movement in the dairy industry which it saw as directly contrary to a legitimate interest in discouraging the proliferation and further entrenchment of throw-away containers. It determined to block that movement as inimical to policies calling for *reduction* of solid waste, energy usage and reliance upon scarce fossil fuels. Under the standards adopted by the majority of the Minnesota Supreme Court such action is unconstitutional unless the legislature also acts simultaneously to eliminate past problems attributable to the previously established package. Furthermore, no action to prevent unnecessary consumption of oil or natural gas will be upheld unless it will, by itself, result in substantial fuel saving.

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[12] Recent world events serve to underscore the need to closely question the wisdom of each and every action requiring the use of irreplaceable fossil fuel resources. The President's analogy of our current energy difficulties as the "moral equivalent of war" calls for us to seriously question anything which increases reliance upon nonrenewable oil or natural gas supplies. The strong national policy promoting the urgent search for alternatives to fossil fuels (*see, e.g.*, 42 USC §§ 5901, 6851, 6881 (1977)) indicates that it is *per se* reasonable to discourage practices which are reliant upon fossil fuels in favor of those using renewable resources. If, however, a single piece of legislation which serves that end may be struck down simply because a court sees its effect as a drop in the bucket then each such measure will likewise fail and the country will be denied the potential cumulative benefit of many measures, modest in themselves, but highly significant in the aggregate.

If permitted to stand as a principle of equal protection law in general and a leading case in packaging law in particular, this decision will have a severe chilling effect in Minnesota and elsewhere upon legislative efforts to curb activities which result in the commitment of further capital and resources to policies which value profit and convenience over environmental and conservation concerns.

Thus, the importance of this case goes beyond the issue of whether Minnesota ought to either ban both plastic and paper milk containers simultaneously or ban neither. Rather, the case demonstrates the particular need for this Court to reaffirm for the benefit of the State of Minnesota and other states which may consider similar environmental legislation:

1. That reform may take a step at a time;
2. That a legislative act need not prohibit all evils of a given type at once;
3. That a state in prohibiting deleterious conduct is not compelled by the Constitution to demonstrate that such conduct is, in all respects, the most deleterious of all alternative courses of action;
4. That the status quo is not a constitutional standard against which future efforts at regulation must be judged; and
5. That, absent total irrationality, it is for the legislature to judge the wisdom and perceived effect of a legislative act.

III. THE MINNESOTA COURTS EXCEEDED THEIR PROPER SCOPE OF REVIEW IN RESOLVING CERTAIN MATTERS OF LEGISLATIVE FACT CONTRARY TO DECISIONS OF THIS COURT.

While it is not the intent of the state to belabor factual matters here, if the petition is granted, the state will undertake to demonstrate that in ruling on certain matters of legislative fact upon which the record contains divided or inconclusive evidence,[13] the Minnesota Court exceeded the proper scope of judicial review. As this Court has said in *Vance v. Bradley*, 440 U.S. 93, 111 (1979):

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *Lindsley v. Natural Carbonic Gas Co., supra*, at 78-79; accord, *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); see *McGinnis v. Royster*, 410 U.S. 263, 274 (1973) (finding that the legislature "could have concluded rationally that" certain facts

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[13] The Court essentially determined

1. that the plastic containers would not consume more landfill space than paper;
2. that the plastic container consumed no more energy than paper;
3. that the amount of fossil fuels used in making plastic containers is insignificant; and
4. that prohibition of the plastic container would not encourage use of returnable or pouch containers.

were true); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955). As we have said in a slightly different context:

> The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.' *Fireman v. Chicago, R.I. & P.R. Co.*, 393 U.S., at 138-139.

CONCLUSION

Thus the petition for certiorari should be granted; both to correct the result in this case, itself, and to assure that future legislative decisions will be made with proper constitutional standards in view.

Dated: January, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX A
OPINION OF THE MINNESOTA SUPREME COURT
RAMSEY COUNTY

CLOVER LEAF CREAMERY COMPANY, et al.,
Respondents,

vs.

STATE OF MINNESOTA,
Appellant.

Peterson, J.
Dissenting,
Wahl, J.
Endorsed
Filed September 7, 1979
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Laws 1977, c. 268, which creates a statutory classification whereby plastic nonrefillable milk containers are banned and paper milk containers are preserved, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, because the classification is not rationally related to a legitimate state interest:

(a) The evidence conclusively demonstrates that in the categories of solid waste management, energy waste, and depletion of natural resources (matters of specific concern

in the Act), the environmental effects of paper milk containers are not less harmful than the environmental effects of plastic nonrefillable milk containers; and

(b) The evidence further establishes that the classification will not promote the Act's stated goal of encouraging the use of refillable milk containers.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

PETERSON, Justice.

Defendant, state of Minnesota, appeals from the trial court's judgment in favor of plaintiffs,[1] holding L. 1977, c. 268 (the Act), to be unconstitutional.[2] We affirm the trial court's judgment and hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United

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[1] Plaintiffs generally may be divided into two categories—those involved in the packaging and sale of milk; those involved in the production and sale of plastic goods and associated equipment.

The first category includes:

1. Clover Leaf Creamery Company.
2. Marigold Foods, Inc.
3. Wells Dairy, Inc.
4. Weber & Barlow Stores, Inc.

The second category includes:

1. The Society of the Plastics Industry, Inc.
2. Phillips Petroleum Company
3. Hoover Universal, Inc., formerly Hoover Ball and Bearing Company
4. M-H Packaging Systems, Inc.

[2] The trial court held L. 1977, c. 268, to be unconstitutional on three grounds:

(1) The act deprives plaintiffs of equal protection of the law in contravention of U. S. Const. Amend. XIV;

(2) The Act deprives plaintiffs of substantive due process of law in contravention of U. S. Const. Amend. XIV and Minn. Const. art. 1, § 7; and

(3) The act constitutes an unreasonable burden upon interstate commerce in contravention of U. S. Const. art. I, § 8.

States Constitution, because it establishes a classification which is not rationally related to a legitimate state interest.

The Act, approved on May 26, 1977, provides:

> "Section 1. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.[3]
>
> "Sec. 2. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese and yogurt, in a non-returnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.
>
> "Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.[4]
>
> "Sec. 3. This act is effective July 1, 1977."[5]

We note three specific aspects of this unique statute:[6] (1)

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[3] Laws 1977, c. 268, § 1, codified as Minn. St. 116F.21.

[4] Laws 1977, c. 268, § 2, codified as Minn. St. 116F.22.

[5] Laws 1977, c. 455, § 96, superseded L. 1977, c. 268, § 3, and provided, in part: "Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, nonrefillable plastic containers shall be effective prior to July 1, 1978."

[6] Minnesota is the only state that has legislatively banned nonrefillable plastic milk containers. Ontario, Canada, has banned both plastic and paper nonrefillable milk containers by executive action.

The Act does not, under any circumstances, permit the use of nonrefillable[7] plastic containers for milk;[8] (2) milk is the only commodity affected by the Act, plastic containers are not banned unless they are filled with milk; and (3) only plastic nonrefillable milk containers are affected by the Act, paper nonrefillable milk containers are not affected.[9]

Plaintiffs contend the Act violates the equal protection clause of the Fourteenth Amendment because it creates a classification in which paper containers are to be preserved while plastic nonrefillables are to be banned. Because the present statute involves economic regulation, the relevant test is whether the classification is rationally related to a legitimate state interest. New Orleans v. Dukes, 427 U. S. 297, 96 S. Ct. 2513, 49 L. ed. 2d 511 (1976). Plaintiffs argue that a rational classification is not established because, from an environmental standpoint, paper containers are not superior to plastic nonrefillables, and a ban on plastic nonrefillables will serve to encourage the use of paper containers instead of serving to encourage the use of refillable milk containers.

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[7] The Act mentions "nonreturnable, nonrefillable containers." A container can be returnable without being refillable. For example, the plastic milk bottle banned by the Act can be returned for recycling, but it cannot be used again to package milk. The term "nonrefillables" is therefore used throughout this opinion to describe milk containers which cannot be used again for the same purpose.

[8] The container referred to is a high density polyethylene plastic container which cannot be returned to the dairy to be refilled with milk for sale to consumers. For the remainder of the opinion, these containers will be referred to as "plastic nonrefillables."

[9] The container referred to is a plastic coated, paperboard container which cannot be returned to the dairy to be refilled with milk for sale to customers. The container is composed of bleached kraft paper coated with low density polyethylene, a plastic related to that used in plastic nonrefillable milk containers. Low density polyethylene comprises about 10 percent of the weight of the container. For the remainder of the opinion, these containers will be referred to as "paper containers."

The Act is intended to further the policies stated in Minn. St. 116F.01; therefore, it is intended to promote the state interests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream. L. 1977, c. 268, § 1. Specifically, the stated legislative finding of the Act is that nonrefillable milk containers present solid waste management problems, promote energy waste, and deplete natural resources; the stated legislative goal is that use of returnable milk containers should be encouraged. L. 1977, c. 268, § 1. The Act, undoubtedly, deals with legitimate state interests. The crucial question is whether the classification separating paper containers from plastic nonrefillables is reasonably related to these state interests.

We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives. Considering only the specific areas of solid waste management, energy waste, and depletion of natural resources, it is clear that the environmental effects of paper containers are not less harmful than the effects of plastic nonrefillables. It is also apparent that the classification will not further the Act's stated goal of encouraging the use of refillable milk containers.

The record supports the trial court's finding that plastic nonrefillables present fewer solid waste management problems than paper containers. The major method of solid waste disposal is by landfill deposit. The evidence at trial established that plastic nonrefillables are superior to paper containers for landfill disposal.

Defendant's expert witnesses agreed that the principal environmental hazards posed by landfill disposal are pollution of underground water, which is caused by leaching, and the creation and escape of methane gas. Both of these environmental hazards are created by waste decomposition. Bacterial and other chemical reactions, combined with percolation of water and other liquids, create leachates which seep into the ground and ultimately into underground water. The same reactions create methane gas, which is both noxious and explosive. Paper milk containers contribute to these environmental hazards because they begin to decompose as soon as the plastic coating on the exterior of the container is punctured or torn. Plastic nonrefillables are essentially inert and therefore do not contribute to the creation of leachates and methane gas.

Maintaining landfill stability is important in landfill disposal for two reasons. First, stability minimizes cracking of the final landfill cover. Such cracking results in the generation of leachates. Second, landfill stability encourages productive use of the landfill site after the landfill project is completed. Because waste decomposition creates landfill instability, plastic nonrefillables contribute to landfill stability while paper containers do not.

The trial court's finding that plastic nonrefillables and paper containers occupy substantially the same amount of landfill space is also justified by the evidence. Plastic non-

refillables contain less raw material and have greater density than paper containers. If total compaction (no void spaces left in containers) is achieved, plastic nonrefillables will occupy less landfill space. The evidence at trial demonstrated that during collection waste is typically compacted to a ıraction of its original volume, that it is compacted further when deposited at the landfill, and that it has continual pressure exerted upon it as other layers of waste are deposited. Under these conditions, there is no basis for asserting that plastic nonrefillables occupy more landfill space than paper containers.[10]

Data in a 1977 final report by Midwest Research Institute (MRI) and the United States Environmental Protection Agency (EPA)[11] supports defendant's argument that plastic nonrefillables take more landfill space than paper containers; however, accuracy of the figures in the MRI report was persuasively attacked by plaintiffs' expert witnesses. Highly significant was the testimony of Richard Welch, a chief investigator involved in the MRI report. Welch indicated that in the first draft of the MRI report it was assumed, based upon con-

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[10] Plaintiffs provided a relevant demonstration of compaction during the cross-examination of defendant's solid waste expert, Harold Samtur. Counsel for plaintiff crushed samples of both containers with his bare hands. Samtur estimated that the crushed volume of each container was between 10 and 20 percent of its original volume. He further acknowledged that there was virtually no springback of the plastic nonrefillable after it had been crushed and released and that the springback which did occur could be eliminated by squeezing the container between thumb and forefinger.

[11] The report, entitled "Resource and Environmental Profile Analysis of Five Milk Container Systems," was an objective quantification of resource and environmental impacts associated with five milk container systems, including paper containers and plastic nonrefillables, and was the primary source of documentary evidence at trial on the environmental effects of paper containers and plastic nonrefillables. For the remainder of this opinion, the report will be referred to as the "MRI report."

versations with experts, that plastic nonrefillables and paper containers would compress to within 10 percent of their original volume. The American Paper Institute then provided MRI with a study prepared by the Weyerhaeuser Corporation involving the compressibility of milk containers. The test used in the Weyerhaeuser study indicated that paper was superior to plastic. MRI incorporated the Weyerhaeuser finding in its final report because no other written documentation was available. Welch criticized the test conducted by Weyerhaeuser because it neglected to specify the weights of the containers used and because the test was conducted in a laboratory, not under conditions approximating those found in a landfill.[12] William E. Ades of the EPA testified that he too was less confident of compressibility figures in the MRI report than of figures in other categories of container comparison. Welch further testified there was insufficient evidence to conclude that either type of container would consume more landfill space than the other. The contrary conclusion of defendant's solid waste expert, Harold Samtur, was based upon a weak and inconclusive foundation[13] and, as the trial court indicated, lacked convincing quality.

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[12] In this test, the volume of a container was measured after the container was crushed with a laboratory device and the device was totally released, with no continual pressure exerted upon the container. The evidence at trial indicated waste is compacted to a fraction of its original volume during collection, is compacted even further when deposited at a landfill, and has continual pressure exerted upon it as other layers of waste are deposited.

[13] Harold Samtur relied upon three sources for his conclusion: One, the MRI report. (Samtur accepted the compressibility figures of the MRI report without examining their derivation, in spite of Welch's testimony about their inadequacy.) Two, a 1972 report prepared by a milk packaging working group for the Ministry of the Environment in the Province of Ontario, Canada. (The Ontario researchers estimated the compaction ratio for a refillable plastic milk container and then assumed that the much lighter plastic nonrefillable would consume the same space. The group

Solid waste disposal is also achieved by incineration, a method of disposal in which plastic nonrefillables are superior to paper containers. Although currently not widespread, incineration will become more prevalent as technology advances and the energy value of the heat generated by it can be economically utilized. Both plastic nonrefillables and paper containers burn, but plastic nonrefillables have a much higher Btu value, which results in the recovery of more energy than can be recovered from burning paper containers. Moreover, plastic nonrefillables incinerate completely and do not emit noxious gases into the atmosphere, while paper containers leave residue and emit small amounts of noxious gases.

Recycling is yet another method of solid waste disposal. One of the express purposes of Minn. St. c. 116F is to encourage the reuse and recycling of materials. Plastic nonrefillables are recyclable because they can be ground and used to make a large number of polyethylene products.[14] Paper containers are not recyclable because the paperboard and the plastic coating cannot be separated.

"Source reduction" is a further aid in solid waste management and is similarly an express goal of Minn. St. c. 116F. In the present case, the major relevant source-reduction factor is the constantly declining weight of plastic nonrefillables. Plastic nonrefillables weigh a fraction more than half the

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also used a nonrefillable plastic milk container incomparable to the container now used in Minnesota, because it was almost 50 percent heavier and was more difficult to crush.) Three, a 1969 study, the "Eggshell Report," on the disposable characteristics of containers. (The study did not include samples of milk containers.)

[14] The evidence indicates that plaintiff Clover Leaf Creamery Company has a voluntary plastic milk container recycling program. Clover Leaf picks up plastic milk containers that are returned to retail stores, grinds them, and sells the plastic material to a salvage dealer.

weight of paper containers and therefore generate less waste. While the unit weight of gallon paper containers has remained at 115 grams or more for at least the past 5 years, improvements in resin, production machinery, and container design have brought about substantial reduction in the weight of plastic nonrefillables.[15] Such a reduction in weight causes a proportional decrease in the amount of raw material used and the amount of waste generated, along with lessened impacts in other environmental categories.[16]

The evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers.

Similarly, in the category of energy waste, the evidence establishes that paper containers are not superior to plastic nonrefillables. While the figures in the MRI report on energy consumption support defendant's position that less energy is required to produce paper containers, the accuracy of the figures was successfully eroded by plaintiffs. Computed in the MRI report were two values for the amount of energy consumed in the production of paper containers. The higher figure included, while the lower figure excluded, the energy value

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[15] In 1964, gallon plastic nonrefillables made on blow-molding machines manufactured by plaintiff Hoover Universal, Inc. weighed 100 grams per unit. By 1973, plastic nonrefillables generally used in the dairy industry weighed 70 grams each, the weight used in the MRI report. Blow-molding machines are currently manufactured to mold 60-gram bottles. The average weight used throughout the country, including Minnesota, is currently 65 grams. One Hoover dairy customer presently uses 57-gram containers.

[16] Defendant argues that some reduction will occur under the Act, because use of refillable milk containers will be encouraged. As discussed later in this opinion, the evidence conclusively demonstrates that increased use of refillable milk containers will not be the result of a ban on plastic nonrefillables.

of the wood waste (wood bark and sawdust) generated by the paper manufacturing process. When MRI included the energy value derived from burning wood waste (resulting in a higher figure and a higher level of adverse environmental impact), paper containers were slightly superior to plastic nonrefillables. When MRI did not include the energy value derived from burning wood waste (resulting in a lower figure and a lower level of environmental impact), paper containers were superior. However, MRI's figures for plastic nonrefillables did not take into consideration the effect of the energy value of the waste gases produced in making high density polyethylene. Welch, a chief investigator in the MRI report, testified that a meaningful comparison between plastic nonrefillables and paper containers in the category of energy consumption requires inclusion of wood waste energy in computing the amount of energy consumed in producing paper containers. Welch's testimony was properly credited by the trial court.[17] In its tests, MRI used plastic nonrefillables weighing 70 grams. The average weight of plastic nonrefillables now used in Minnesota is 65 grams. If 65-gram plastic nonrefillables are used and the energy value derived from burning wood waste is included in energy consumption figures for paper containers, the figures demonstrate that production

[17] The evidence at trial indicated that the petroleum industry has, for years, used waste gases to fuel or power various processes. However, it is difficult to pinpoint what amount of energy used in petrochemical processing represents waste energy. The plastics industry generally does not break down the sources of energy used in these processes, because it would be extremely difficult to engage in such an inquiry.

of plastic nonrefillables requires less energy than production of paper containers.[18]

The evidence introduced at trial therefore demonstrates that production of plastic nonrefillables does not require more energy than production of paper containers. The evidence also establishes that the amount of oil and natural gas consumed in the production of high density polyethylene for plastic nonrefillables is negligible and that banning plastic nonrefillables will not increase the volume of natural gas or oil presently marketed for heating or fuel purposes. Thus, drawing a distinction between plastic nonrefillables and paper containers is not reasonably related to the state's interest in preventing energy waste.

Furthermore, drawing a distinction between plastic nonrefillables and paper containers is not reasonably related to the state's interest in conserving natural resources. In spite of the fact that timber is considered to be a renewable resource and oil and natural gas are considered to be nonrenewable resources, the evidence demonstrates that banning plastic nonrefillables will not result in lower consumption of natural resources. The amount of crude oil and natural gas used for producing plastic nonrefillables is so small that a ban on plastic nonrefillables will not alter the volume of resources consumed for non-fuel purposes. If any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable. The record establishes that the

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[18] Furthermore, the evidence demonstrates that if the energy value of raw material in each container is excluded or included in determining the amount of energy needed to produce the container, plastic nonrefillables are environmentally superior to paper containers.

Richard Welch, a chief investigator for MRI, concluded that the energy impact of plastic nonrefillables and paper containers is virtually the same.

weight of plastic nonrefillables is continually being reduced and that plastic nonrefillables are recyclable.[19]

The evidence conclusively establishes that the stated goal of the Act, to encourage or promote a return to the use of refillable milk containers, will not be furthered by banning plastic nonrefillables. In 1977, plaintiff Clover Leaf Creamery Company made an effort to revive refillable milk containers in Minnesota and found that consumers would not purchase milk in refillable bottles, even when the only alternatives in some instances were paper containers. Clover Leaf was forced to take back large quantities of milk and finally sold several thousand unused refillable containers at a loss. The rejection of refillable containers occurred even though the cost to retailers was 4 cents less per gallon for returnable containers than for nonrefillable containers and even though thousands of dollars were spent in promoting refillable milk containers. The evidence also indicated that in Ontario, where both plastic nonrefillables and paper containers were administratively banned in 1972, consumers have turned to a third nonrefillable container, the "plastic pouch," as an alternative to refillable containers. Whereas 47 percent of the milk containers used in Ontario in 1971 were refillable, in 1977, the percentage was 19.7.

The evidence demonstrates that convenience is an important factor for consumers and that consumers will therefore

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[19] When other environmental factors are considered, the superiority of plastic nonrefillables is more evident. For example, the MRI report analyzed factors in addition to energy and compressibility. Using 70-gram plastic nonrefillables, the study demonstrated that production of paper containers (1) consumes more water; (2) generates more water-borne waste; (3) consumes greater quantities of raw materials; and (4) generates more industrial solid waste than plastic nonrefillables. However, the MRI report indicated that paper containers are environmentally superior in the category of atmospheric emissions.

use paper containers instead of refillables if plastic nonrefillables are banned. The environmental effects of producing, using, and disposing of paper containers are not less harmful than the environmental effects associated with plastic nonrefillables.

Defendant argues that even if it is assumed that paper containers are not environmentally superior to plastic nonrefillables, the classification drawn in the Act is rationally related to another legitimate state interest — prohibiting the use of plastic nonrefillables before a significant foothold is acquired in the Minnesota milk market.

Defendant argues that the Act was initiated in response to a move in late 1976 by major Minnesota dairies to a long term commitment to packaging milk in plastic nonrefillables. Defendant reasons that the undoubted consumer convenience of plastic nonrefillables combined with the capital investment in machinery designed to produce plastic nonrefillables and the economic gains to be made by maximizing production would have effectively eliminated any likelihood that the Minnesota dairy industry would later voluntarily turn to refillable containers. Defendant also argues that because nationwide trends indicate plastic nonrefillables dominate in any milk market, it may have been the legislature's concern that if it failed to ban plastic nonrefillables, future regulation against plastic nonrefillables would become too disruptive economically and therefore impossible to achieve. In other words, defendant asserts that the legislature may have believed that if action was not taken to limit the introduction of plastic nonrefillables, they would become immovably entrenched in Minnesota. The evidence indicates, however, that in the early 1970's use of plastic nonrefillables had been established in

many areas of Minnesota, excluding the Twin Cities metropolitan area.

The state interest asserted by defendant is, on this record, speculative and illusory. The gravamen of defendant's argument is that by presently banning plastic nonrefillables, the legislature will, in the future, be better able to promote environmentally sound milk packaging, such as refillable containers. However, the evidence at trial indicates that the Minnesota Pollution Control agency does not presently plan to take or propose further action on the subject of milk containers. Similarly, action by the Minnesota Legislature is uncertain, if not highly doubtful. The original version of the Act included a provision banning paper containers, but that provision was eventually removed from the Act. There is no evidence, therefore, that paper containers will cease to be used in the Minnesota milk market. Because paper containers are not environmentally superior to plastic nonrefillables, any asserted environmental benefit in preventing plastic nonrefillables from being widely used in Minnesota is illusory.

Defendant nevertheless contends that the Act should be upheld as a first step toward solving the overall problem of milk container waste. We do not doubt that legislatures may implement economic programs step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e. g., Katzenbach v. Morgan, 384 U. S. 641, 86 S. Ct. 1717, 16 L. ed. 2d 828 (1966); Williamson v. Lee Optical Co. 348 U. S. 483, 75 S. Ct. 461, 99 L. ed. 563 (1955). However, such a step must, at the very least, have a rational relationship to achievement of a legitimate state interest. In the present case, the result of the Act, at best, will not be a step toward amelio-

ration of a perceived evil. The evidence is conclusive that paper containers are not environmentally superior to plastic nonrefillables.

We hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it establishes a classification which is not rationally related to a legitimate state interest.[20]

Affirmed.

WAHL, Justice (dissenting).

While I am persuaded by the evidence cited by the majority which indicates that plastic nonrefillables are no worse, from an environmental standpoint, than paper nonrefillables, I cannot agree that the plastic nonrefillables ban, struck down today, is not "rationally related to a legitimate state interest." I view it as a constitutionally permissible "first step" in a pro-environmental effort on the part of the legislature.

The Court in New Orleans v. Dukes, 427 U. S. 297, 303, 96 S. Ct. 2513, 49 L. ed. 511 (1976), upheld, *per curiam*, the constitutionality of a New Orleans ordinance prohibiting the sale of foodstuffs from pushcarts, except by vendors who had continually operated such a vending business within the French Quarter for 8 years. That classification effectively operated to disqualify all food vendors except two, and there was no reason to believe the two were more likely than any

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[20] The trial court treated plaintiffs' equal protection and substantive due process attacks as separate questions; but under substantive due process analysis, the means chosen by the challenged legislation similarly must bear a rational relation to the public purpose sought to be served. See, e. g., Federal Distillers, Inc. v. State, 304 Minn. 28, 46, 229 N. W. 2d 144, 158 (1975). The trial court also concluded that the Act constitutes an unreasonable burden on interstate commerce in contravention of art. I, § 8, of the United States Constitution; but because of our decision on equal protection grounds, we do not consider that issue.

others to "preserve the traditions" of the French Quarter, the ordinance's alleged purpose. To the charge that the classification was "a totally arbitrary and irrational method of achieving the city's purpose," the Supreme Court answered:

> "* * * rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible." 427 U. S. at 305, 96 S. Ct. at 2517.

The court articulated the role of the judiciary with respect to legislative economic regulations as follows:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed.2d 828 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g.*, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth

Amendment. See, *e.g., Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963)." 427 U. S. at 303-304, 96 S. Ct. at 2517.

Given such instruction by the highest court in the land, I fail to see how we can distinguish the milk container legislation struck down here from the pushcart vendor prohibition upheld in New Orleans v. Dukes. Regardless of the environmental superiority, found by the majority, of plastic over paper containers, the legislature is free to use a "stepwise" approach, adopting only a partial solution to the waste problem. The legislature could rationally conclude that allowing the plastic nonrefillables to become entrenched in Minnesota would hinder future efforts to force the dairy industry to utilize more environmentally acceptable containers.

The majority concludes that "further action on the subject of milk containers * * * by the Minnesota Legislature is uncertain, if not highly doubtful," citing as evidence the fact that an earlier version of the bill had contained a provision banning paper nonrefillables as well, which provision was eventually removed. However, it is at least arguable that such evidence leads to precisely the opposite conclusion—the same conclusion which might be drawn from the following statements made by senators at the debates on the nonrefillables bill, transcribed and entered in the trial record as Exhibit J:

> "Senator Spear: '* * * It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another nonreturnable system with all the investment and all of the vested interest that is going to involve to begin.'" Full

Senate Floor Discussion, 70th Legislature, May 20, 1977.

"Senator Luther: '* * * the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. * * * There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.'" Full Senate Floor Discussion, 70th Legislature, May 20, 1977.

The U. S. Supreme Court has frequently observed that a step-by-step approach in economic regulation is permissible, see, e.g., New Orleans v. Dukes, *supra*; Katzenbach v. Morgan, 384 U. S. 641, 86 S. Ct. 1717, 16 L. ed. 2d 828 (1966), and cases cited therein, and has never required actual evidence that a legislature intends to take a further step in the near future in the relevant economic area being regulated. Here, however, it is at least fair to conclude from the legislative history that the Minnesota legislature indeed intended that the bill banning plastic nonrefillables would be a "first step" in the environmental effort. The U. S. Supreme Court's cautions are well taken here; it is not for this court "to judge the wisdom or desirability of legislative determinations" in this area of economic regulation.

The majority opinion, in its discussion of the Ontario experience with a ban on all nonrefillable milk containers, suggests that such a total ban was actually detrimental to environmental efforts, pointing to evidence that the market share of refillables has dropped since the ban was enacted. Trial evidence established, however, that the plastic pouch is clearly

superior from an environmental standpoint to both plastic and paper nonrefillables. Thus, while the measure perhaps did not have precisely the effect intended, it nevertheless had salutary environmental impact. To suggest that such a total ban would not benefit the environment is not only contrary to the evidence; it undermines any attempts on the part of the legislature to proceed with "complete elimination of the evil," an effort of which the plastic nonrefillables was but the first step.

Because I believe that Chapter 268, here declared unconstitutional, was precisely the type of regulation which the U. S. Supreme Court sanctioned in New Orleans v. Dukes, I respectfully dissent from this court's holding that this measure denies equal protection. Having found that Chapter 268 withstands the equal protection challenge, I would further hold that it is not in violation of the commerce clause, Raymond Motor Transportation, Inc. v. Rice, 434 U. S. 429, 440, 98 S. Ct. 787, 793, 54 L. ed. 2d 664, 674 (1978), or the due process clause, Exxon Corp. v. Governor of Maryland, 437 U. S. 117, 124-125, 98 S. Ct. 2207, 2213, 57 L. ed. 2d 91, 99 (1978); Federal Distillers, Inc. v. State, 304 Minn. 28, 38, 229 N. W. 2d 144, 154 (1975), but is a constitutional exercise of legislative powers.

APPENDIX B

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT OF THE DISTRICT COURT OF RAMSEY COUNTY, SECOND JUDICIAL DISTRICT, STATE OF MINNESOTA (Not published)

This matter was tried by the Court without a jury commencing March 15 and concluding March 21, 1978. Plaintiffs appeared by their attorneys, Leonard J. Keyes, Esq., and Douglas L. Skor, Esq.; defendant, by its attorneys, Byron E. Starns, Esq., Deputy Attorney General and Kenneth E. Raschke, Jr., Esq., Assistant Attorney General.

Upon the evidence adduced at the trial and all of the files and records herein, including the memoranda submitted by counsel, the Court makes the following as

FINDINGS OF FACT

1. The Court has jurisdiction over the parties and the subject matter; a justiciable controversy exists.

2. Plaintiff Clover Leaf Creamery Company ("Clover Leaf"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interstate commerce. It owns equipment which

blow-molds plastic milk containers which are not intended to be returned to the retailer for refilling with milk ("nonreturnable, nonrefillable"). It utilizes these containers for marketing of Clover Leaf products, including milk, and also sells them to other dairies for marketing their respective products, including milk.

3. Plaintiff Marigold Foods, Inc. ("Marigold"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interstate commerce. It is the lessor of equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for marketing its products, including milk. It has packaged and distributed milk in such containers in Minnesota and elsewhere since 1973.

4. Plaintiff Phillips Petroleum Company ("Phillips"), a Delaware corporation, manufactures polyethylene resin and distributes it in interstate commerce to Minnesota customers, including Clover Leaf. This resin is the material used for the blow-molding of nonreturnable, nonrefillable plastic milk containers.

5. Plaintiff Hoover Ball & Bearing Company has recently changed its corporate name to Hoover Universal, Inc. Plaintiff Uniloy Division of Hoover Universal, Inc. ("Uniloy"), a Michigan corporation, manufactures and sells blow-molding equipment and accessories for the production of nonreturnable, nonrefillable plastic milk containers. It is engaged exclusively in interstate commerce in its Minnesota activities. It has manufactured and sold all of the blow-molding equipment presently utilized in Minnesota for the fabrication of nonreturnable, nonrefillable milk containers.

6. Plaintiff The Society of the Plastics Industry, Inc., ("SPI"), a New York nonprofit corporation, is the principal trade association for the United States plastic industry. It includes in its membership corporation engaged in the production of polyethylene resins, the manufacture and sales of blow-molding equipment and the fabrication of nonreturnable, nonrefillable plastic milk containers. Its members are principally engaged in interstate commerce.

7. Plaintiff Wells Dairy, Inc. ("Wells"), an Iowa corporation, is engaged in the distribution of milk and milk products in interstate commerce in Minnesota and elsewhere. It owns equipment in Iowa which blow-molds nonreturnable, nonrefillable plastic milk containers for such distribution. It has distributed milk in Minnesota in such containers since 1973.

8. Plaintiff M-H Packaging Systems, Inc., ("M-H"), a Minnesota corporation, has a plant in Ramsey County, Minnesota. In that plant it owns equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for sale to dairies in Minnesota and in interstate commerce.

9. Plaintiff Weber & Barlow Stores, Inc., ("Barlow"), a Minnesota corporation, is engaged in the retail grocery business in Rochester, Minnesota and in outlets in Iowa and North Dakota. Among its products for retail sale is milk packaged in nonreturnable, nonrefillable plastic containers.

10. Plaintiff Dennis Johnson, d/b/a Johnson Star Market ("Johnson") has sold his retail grocery business since this action has been filed and is no longer a real party in interest.

11. In 1977, the Minnesota Legislature enacted a criminal statute, Laws of Minnesota 1977, Chapter 268 (coded as Sections 116F.21 and 22, MSA). Chapter 268 provides:

"Section 1. 116F.21) (Milk packaging, statement of policy.) The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature, therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.

Section 2. (116F.22) (Prohibitions) Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.291, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.

Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense."

Laws of Minnesota 1977, Chapter 455, Section 96, provided that the effective date of Chapter 268 is July 1, 1978.

12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.

13. In enacting Chapter 268, the Legislature's published purpose was to discourage the use of nonreturnable, nonrefill-

able milk containers and encourage the use of returnable milk containers.

14. Chapter 268, if implemented, would not encourage the use of returnable milk containers. It would increase the use of a more expensive and environmentally harmful nonreturnable, nonrefillable paperboard container.

15. In enacting Chapter 268, the Legislature purported to find that the use of nonreturnable, nonrefillable plastic milk containers:

a. Presents a solid waste management problem.

b. Promotes energy waste and depletes natural resources.

16. There is no basis in fact for these findings in the light of Chapter 268's effect of promoting the greater use of paperboard milk containers because:

a. The nonreturnable, nonrefillable plastic milk containers in use today present fewer solid waste management problems than do paperboard containers. Their quantitative contribution to the solid waste stream is miniscule.

b. The plastic milk containers constitute a stable, inert contribution to the landfills. They incinerate almost completely with nonnoxious emissions. They provide approximately 20,000 BTU's of heat during incineration and permit total combustion of other waste products. On the other hand, paperboard milk cartons decay in landfills and contribute to landfill instability, permit see page of leachate into underground water supplies and produce inflammable and explosive methane gas. They provide approximately 7,000 BTU's of heat during combustion

and emit a small amount of noxious gases into the atmosphere.

c. As long as there is petroleum, there will be polyethylene, a petroleum by-product which is used for many purposes in addition to the manufacture of milk containers. Both petroleum and wood are natural resources subject to depletion from innumerable sources, one of the least being milk containers.

17. In enacting Chapter 268, the Legislature purported to rely on a number of policy goals found in Section 116F.01, M.S.A.:

a. To encourage the reduction of the amount and type of materials entering the solid waste stream.

b. To encourage the reuse and recycling of materials.

c. To encourage the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

18. Chapter 268, if implemented, will not succeed in effecting the Legislature's published policy goals because nonreturnable, nonrefillable plastic milk containers will be substantially replaced on the market by nonreturnable, nonrefillable paperboard milk containers. The effects of this replacement on the published goals are:

a. Reduction of the amount and types of materials entering the solid waste system is not encouraged. Gallon paperboard containers weigh almost twice as much as gallon plastic containers and have a greater volume; they occupy substantially the same amount of landfill space after compaction and are coated with polyethylene.

b. Reuse and recycling of materials is not encouraged. Nonreturnable, nonrefillable plastic milk containers are recyclable. Nonreturnable, nonrefillable paperboard milk containers are neither reuseable nor recyclable.

c. Chapter 268 does not address the subject of encouraging the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

19. Chapter 268 does not serve a public purpose.

20. The means chosen by Chapter 268 bear no rational relation to the public purpose purported to be served.

21. Chapter 268 is an unreasonable, arbitrary and capricious interference with the production, marketing and consumption of milk and milk products to the detriment of each of the plaintiffs and many members of plaintiff SPI.

22. Chapter 268 bans only nonreturnable, nonrefillable plastic containers of milk and certain milk products. It does not affect any other milk container or any package of any other substance whatsoever. This classification is unreasonable and arbitrary. It bears no rational relationship to the purported objects of Chapter 268.

23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268.

24. The substantial burdens imposed on interstate commerce by Chapter 268 are impermissible. For example, Chapter 268, if implemented, would effectively prevent:

a. Plaintiff Wells and all out of state dairies who market milk in Minnesota in interstate commerce from marketing it in Minnesota in nonreturnable, nonrefillable plastic containers.

b. Plaintiff Clover Leaf from marketing milk interstate in nonreturnable, nonrefillable plastic containers or marketing such containers interstate.

c. Plaintiff M-H from marketing such containers interstate.

d. Plaintiff Uniloy and all other out of state manufacturers and distributors of blow-molding equipment in interstate commerce from selling such equipment in Minnesota for the purpose of fabricating nonreturnable, nonrefillable plastic milk containers.

e. Plaintiff Phillips and all other out of state suppliers of polyethylene resin in interstate commerce from selling their product in Minnesota for the purpose of fabricating nonreturnable, nonrefillable plastic milk containers.

From the foregoing Findings of Fact, the Court makes the following as

CONCLUSIONS OF LAW

1. Chapter 268 deprives each of the plaintiffs and many members of plaintiff SPI of substantive due process of law in contravention of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

2. Chapter 268 deprives each of the plaintiffs and many of the members of plaintiff SPI of the equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

3. Chapter 268 constitutes an unreasonable burden on interstate commerce conducted by plaintiffs and many members of plaintiff SPI in contravention of Article I, Section 8, United States Constitution.

4. If Chapter 268 becomes effective, each plaintiff and many members of plaintiff SPI will suffer irreparable injury and harm for which none has an adequate remedy at law.

5. Laws of Minnesota, 1977, Chapter 268, is null, void and unenforceable.

6. Defendant State of Minnesota and its agencies, political subdivisions and individuals acting or purporting to act on its behalf are permanently enjoined from implementing or attempting to enforce by civil or criminal action or otherwise the provisions of Laws of Minnesota, 1977, chapter 268.

7. Plaintiffs are entitled to recover from defendant their costs and disbursements.

8. The attached Memorandum shall be deemed to be a part of the Findings of Fact and Conclusions of Law herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: This 5th day of April, 1978.

DAVID E. MARSDEN
Judge of District Court

MEMORANDUM

The standards by which constitutionality of the statute must be determined are well settled.

Chapter 268 is clothed with a presumption of validity and may not be struck down unless its infirmity has been established beyond a reasonable doubt.

Likewise, a Court may not substitute its judgment for that of the legislature as to the wisdom or desirability of the act.

The plaintiffs have satisfied the burden imposed upon them.

No other jurisdiction in the entire country has enacted legislation comparable to Chapter 268.

New York City enacted a city ordinance imposing a tax solely on plastic containers. That gave rise to *Society of Plastics Industry v. New York City*, 3 ERC 1370 (1971) where the trial court, in a comprehensive opinion, held the ordinance unconstitutional.

No controlling appellate decision exist.

The relevant legislative history of Chapter 268 support a conclusion that the real basis for it was to serve certain economic interests (paper, pulpwood, and some dairies) at the expense of other competing economic groups (plastic and certain dairies) by prohibiting the plastic milk bottle.

If, indeed, there were substantial environmental factors favoring the use of the paper milk carton, an entirely different situation would be presented. Such is not the case.

Despite the laudable purposes to which the statute purports to address itself, the evidence overwhelming establishes that the enunciated goals will not be achieved.

The history of the use of returnable bottles, both nationally and locally, is revealing. The trends of public acceptance clearly establish a marked preference for nonreturnable forms of packaging.

The evidence presented in this case requires the conclusion that banning plastic containers will only increase the use of paper containers. Defendant has offered no credible evidence showing that an increased use of returnables would be realized.

Thus, reliance on compared superiority of returnables versus nonreturnables, as it affects the problems of post con-

sumer solid waste, as a means of justifying the statute, is without persuasive effect.

Considerable testimony was presented as to the relative merits of plastic versus paper containers. Certain expert witnesses appeared for the plaintiffs and defendant. Numerous exhibits were received.

The Court, as fact-finder, is obliged to weigh and evaluate this evidence, much of which was in sharp conflict. The opinions of witnesses appearing for the plaintiffs are deemed to be entitled to great weight. They were supported by impartial indepth studies done by the Midwest Research Institute for the United States Environmental Protection Agency.

Defendant's experts, on the other hand, expressed opinions which were not persuasive. The foundation for those views was weak and inconclusive. Indeed, "qualitative" factors were emphasized beyond the "quantitative" factors. They were acknowledged to be more judgmental in nature. The opinions ignored certain relevant factors and placed undue emphasis on other factors, and thus lacked convincing quality.

In *Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W. 2d 144, 157-158 (1975), our Supreme Court set out the substantive process requirements of a statute as follows:

> "(1) That the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served."

Mere assertions in the preamble of the statute will not save its constitutionality, when as here, its effects are arbitrary and unreasonable. The additional requirements of "rational relation" is likewise absent.

Plaintiffs have established a violation of their constitutionally protected due process rights.

For similar reasons the statute violates equal protection rights which require that affected classifications be reasonable, not arbitrary, and based upon differences having a fair and substantial relation to the object of the legislature.

Reed v. Reed, 404 U.S. 71, 76 (1971)

Plaintiffs have argued as follows:

"The State has singled out the plastic milk container. It has done nothing to reduce or eliminate the use of the other nonreturnable container of the same product which is more environmentally harmful. It has done nothing to regulate the use of containers of other products which pose more immediate problems, such as littering, and which contribute huge volumes to the solid waste stream. It has done nothing about the use of the very same plastic container, by the very same dairies and stores, for fruit juices. It has done nothing about the myriad nonreturnable, nonrefillable plastic containers used to package non-food products. With no rational basis for its action, it has simply deprived the dairy industry and the consumer of the best container ever devised for milk."

I concur.

Finally, the statute impedes the flow of interstate commerce without providing adequate offsetting local benefits. This is especially true as respects the wholesalers and distributors of milk and ultimately the dairy farmers who sell their product to plaintiffs such as Clover Leaf, Marigold and Wells. They are placed in a disadvantaged position in the market. The highly competitive nature of the milk industry must be acknowledged and taken into account.

In *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 97 S.Ct. 2434, 2446 (1977), the U.S. Supreme Court said

> "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."

Here the "local benefits" have been shown to be a illusory or insubstantial, except for the economic advantages provided the paper and pulpwood industry.

In addition to these claims, plaintiffs have also asserted the statute is so vague, indefinite and ambiguous that its applications and enforcement are left to arbitrary determinations.

In view of the determinations as set forth herein, it is unnecessary to reach or determine the vagueness argument.

D.E.M.

APPENDIX C

TABLE 2

SUMMARY IMPACT DATA FOR 1,000 GALLONS OF MILK DELIVERED
(in one gallon containers by type of container system)

		Milk Container Systems										
		Refillable Containers							Nonrefillable Containers			
		Glass Bottle			Plastic Bottle				Plastic Bottle	Paperboard Carton[a]	Paperboard Carton[b]	Plastic Pouch
Impact category	Units	5-Trip	10-Trip	20-Trip	5-Trip	10-Trip	20-Trip	50-Trip	1-Trip	1-Trip	1-Trip	1-Trip
Raw materials[c]	lb	954.15	480.03	242.97	21.88	14.83	11.31	9.20	17.70	238.88	238.88	2.34
Energy	10^6 Btu	7.42	4.41	2.90	4.98	3.08	2.13	1.56	8.78	6.20	8.62	3.59
Water	10^3 gal.	1.29	0.86	0.64	0.69	0.55	0.48	0.44	0.66	2.87	2.87	0.32
Industrial solid waste	cu ft	2.12	1.10	0.60	0.27	0.18	0.14	0.11	0.38	0.85	0.85	0.13
Atmospheric emissions	lb	32.67	20.93	15.07	19.80	13.70	10.67	8.81	30.86	26.08	26.08	14.02
Waterborne waste	lb	6.26	4.76	4.01	4.08	3.61	3.38	3.32	3.13	6.24	6.24	1.51
Postconsumer solid waste	cu ft	19.92	10.02	5.02	16.24	8.46	5.06	2.00	75.43	30.39	30.39	1.05

Source: Midwest Research Institute.

[a] Total energy without including energy derived from burning wood wastes.

[b] Total energy after including 2.42x 10^6 Btu of energy derived from burning wood wastes.

[c] Hydrocarbon feedstocks are counted as energy rather than pounds of raw materials. Wood fiber, sand, etc., are counted as pounds of raw materials.

Supreme Court, U.S.
FILED
JUN 13 1980

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC. WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 29, 1980
CERTIORARI GRANTED MARCH 31, 1980

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

STATE OF MINNESOTA, COUNTY OF RAMSEY, SECOND JUDICIAL DISTRICT

File No. 423258

Oct. 27, 1977 — Affidavit of service, Notice and Motion to Dismiss filed.

Nov. 22, 1977 — Defendant's memorandum in support of motion to dismiss filed, service admitted.

Nov. 23, 1977 — Affidavit of service, summons and complaint filed.

Dec. 6, 1977 — Defendant's supplemental memorandum filed.

Dec. 22, 1977 — Order and memorandum denying defendant's motion to dismiss filed. Abramson, J.

Jan. 5, 1978 — Defendant's answer and affidavit of service filed.

Jan. 6, 1978 — Court note of issue and affidavit of service filed.

Mar. 15, 1978 — Trial by the court commenced.

Mar. 21, 1978 — Case taken under advisement, Marsden, J.

April 6, 1978 — Findings, conclusions and order of Marsden, J. and notice of entry of findings filed.

April 7, 1978 — Judgment roll made and filed. Judgment entered and served.

April 12, 1978 — Affidavit of service, notice of appeal filed. Return to Supreme Court.

STATE OF MINNESOTA, SUPREME COURT

File No. 48827

April 11, 1978 — Date of service of notice of appeal.

May 4, 1978 — Letter of Otis, J. filed. No preconference. Time for transcript and briefs shall run from 5-2-78.

Aug. 11, 1978 — Certificate of delivery of transcript on 8-7-78 filed.

Sept. 12, 1978 — Order filed permitting Minnesota Public Interest Research Group to file Amicus Curiae brief.

Oct. 10, 1978 — Appellant's (State of Minnesota) Briefs and appendices filed with service.

Oct. 12, 1978 — Briefs of Amicus Curiae (Minnesota Public Interest Research Group) filed with service.

Nov. 20, 1978 — Respondents' Briefs filed with service.

Dec. 8, 1978 — Appellant's reply briefs filed with service.

Mar. 5, 1979 — Hearing En Banc — Calendar No. 111.

Sept. 7, 1979 — Opinion and syllabus filed. Affirmed. Peterson, J. Dissenting, Wahl, J.

Sept. 19, 1979 — Motion, recommendations and order filed extending time to serve and file petition for rehearing to Oct. 5, 1979.

Oct. 5, 1979 — Petition for rehearing filed with service.

Oct. 31, 1979 — Petition for rehearing denied; judgment of affirmance entered; Judgment roll made and filed; remittitur to clerk below; original files and exhibits returned to clerk below.

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

CLOVER LEAF CREAMERY COMPANY,
PHILLIPS PETROLEUM COMPANY,
MARIGOLD FOODS, INC.,
UNILOY DIVISION OF
HOOVER BALL AND BEARING COMPANY,
WEBER & BARLOW STORES, INC.,
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
DENNIS JOHNSON, d/b/a JOHNSON STAR MARKET,
WELLS DAIRY, INC., AND
M-H PACKAGING SYSTEMS, INC.

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

COMPLAINT

Plaintiffs, for their Complaint against the defendant, allege as follows:

INTRODUCTION

1. This is an action for declaratory and injunctive relief whereby plaintiffs seek to have the Court declare invalid and enjoin enforcement of Laws of Minnesota 1977, Chapter 268. Said statute purports to ban the retail sale of milk and fluid milk products in nonreturnable, nonrefillable plastic milk containers in the State of Minnesota. Laws of Minnesota 1977, Chapter 455, Section 96 provides that Chapter 268 is effective July 1, 1978.

PARTIES

2. Plaintiff Clover Leaf Creamery Company (Clover Leaf) is a corporation organized and existing under the laws of the State of Minnesota. It is engaged, *inter alia*, in the packaging and distribution of milk and milk products in the State of Minnesota and in interstate commerce. Its principal place of business is Minneapolis, Minnesota.

3. Plaintiff Phillips Petroleum Company (Phillips) is a corporation organized and existing under the laws of the State of Delaware. It is engaged, *inter alia*, in the business of manufacturing and distributing resin used in the production of plastic milk containers. It distributes such resin in Minnesota and in interstate commerce. Its principal place of business is Bartlesville, Oklahoma.

4. Plaintiff Marigold Foods, Inc. (Marigold) is a corporation organized and existing under the laws of the State of Minnesota. It is engaged, *inter alia*, in the packaging and distribution of milk and milk products in the State of Minnesota and in interstate commerce. Its principal place of business is Minneapolis, Minnesota.

5. Plaintiff Uniloy is a division of Hoover Ball and Bearing Company, a corporation organized and existing under the laws of the State of Michigan. It is engaged, *inter alia*, in the business of manufacturing and distributing machinery for the production of plastic milk containers in Minnesota and in interstate commerce. Its principal place of business is Saline, Michigan.

6. Plaintiff Weber & Barlow Stores, Inc. (Barlow) is a corporation organized and existing under the laws of Minnesota. It is engaged in the retail sale of milk and milk products in Rochester, Minnesota, Minot, North Dakota and Cedar Rapids, Iowa. Its principal place of businss is Rochester, Minnesota.

7. Plaintiff The Society of the Plastics Industry, Inc. (SPI) is a nonprofit corporation organized and existing under the laws of the State of New York. It is the principal trade association for the plastics industry in the United States. It represents approximately 1200 members, which account for 95% of the plastics materials and machinery produced and about 75% of the plastics processing volume in the United States. Most of its members are engaged in interstate commerce. Necessarily included in the plastics market is the State of Minnesota, and SPI's members include plaintiffs Phillips, Uniloy, and Packaging Systems. SPI's main offices are in New York City.

8. Plaintiff Dennis Johnson (Johnson) is a resident of the State of Minnesota and is engaged in the retail sale of milk and milk products. He does business under the name Johnson Star Market, and his principal place of business is Anoka, Minnesota.

9. Plaintiff Wells Dairy, Inc. (Wells) is a corporation organized and existing under the laws of the State of Iowa. It is engaged, *inter alia*, in the packaging and distribution of milk and milk products in the State of Minnesota and in interstate commerce. Its principal place of business is Le Mars, Iowa.

10. Plaintiff M-H Packaging Systems, Inc. (Packaging Systems) is a corporation organized and existing under the laws of the State of Minnesota. It is engaged, *inter alia*, in the business of manufacturing and distributing plastic milk containers in Minnesota and in interstate commerce. Its principal place of business is Little Canada, Minnesota.

COUNT ONE

11. Each plaintiff and numerous members of plaintiff SPI presently are directly or indirectly engaged in, and have

a direct economic interest in, the manufacture, distribution, use and sale of plastic milk containers within the State of Minnesota and between Minnesota and other states.

12. The plaintiffs and numerous members of plaintiff SPI have substantial amounts of money, plant, equipment and personnel involved in the manufacture, distribution, use and sale of plastic milk containers within the State of Minnesota and between Minnesota and other states. Their activity results in substantial quantities of raw materials, equipment, finished products and milk being transported in interstate commerce.

13. Plaintiffs Clover Leaf, Marigold and Wells presently package and distribute milk in plastic containers in Minnesota and adjoining states. Each has invested a substantial amount of money in equipment and improvements in order to market milk in such containers, and a substantial portion of the revenues of each is derived from the sale of milk in such containers.

14. Plaintiffs Barlow and Johnson presently sell at retail milk which is packaged in plastic containers and derive revenues from such sales.

15. Plaintiff Phillips has derived and will continue to derive substantial revenues from the sale of resin for the manufacture of plastic milk containers to customers in Minnesota and other states.

16. Plaintiff Uniloy has derived and will continue to derive substantial revenues from the sale of machinery for the blow-molding of plastic milk containers to customers in Minnesota and other states.

17. Plaintiff Packaging Systems has a manufacturing facility in Little Canada, Minnesota, where it manufactures plastic milk containers. It has derived and will continue to de-

rive substantial revenues from the sale of such containers to customers in Minnesota and other states.

18. In 1977 the Minnesota Legislature enacted Laws of Minnesota 1977, Chapter 268, which provides as follows:

> "Section 1. [116F.21] [Milk Packaging, Statement of Policy.] The legislature finds that the use of nonreturnable nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for the packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.
>
> Section 2. [116F.22] [Prohibitions.] Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.291, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 per cent of which is plastic.
>
> Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.
>
> Sec. 3. This act is effective July 1, 1977."

19. In 1977 the Minnesota Legislature also enacted Laws of Minnesota 1977, Chapter 455, Section 96 of which provides as follows:

> "Sec. 96. [Plastic Milk Bottles.] Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, non-

refillable plastic containers shall be effective prior to July 1, 1978. This section is effective the day following final enactment."

20. In directing its effective proscription solely to non-returnable, nonrefillable, rigid or semi-rigid plastic milk containers, said Chapter 268 discriminates invidiously and without rational basis between said containers and other types of containers and is therefore violative of plaintiffs' entitlement to equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

COUNT TWO

21. Reallege paragraphs 1 through 19.

22. Said Chapter 268 is arbitrary and unreasonable and deprives plaintiffs of due process of law in violation of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

COUNT THREE

23. Reallege paragraphs 1 through 19.

24. The provisions of Chapter 268 are so vague, indefinite and ambiguous that its applicability and enforceability are left to arbitrary and whimsical determination, in violation of the due process guarantees of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

COUNT FOUR

25. Reallege paragraphs 1 through 19.

26. Chapter 268 constitutes an unreasonable burden upon interstate commerce to the detriment of plaintiffs and their customers, contrary to the provisions of Article I, Section 8, of the United States Constitution.

RELIEF SOUGHT

27. By reason of all of the foregoing, there exists a justiciable controversy between plaintiffs and defendant which must be resolved by decree of this Court and plaintiffs are entitled to a declaration of their rights respecting the validity and enforceability of Chapter 268.

28. Unless a temporary injunction is issued by this Court enjoining defendant from implementing and enforcing Chapter 268 until final determination of this action, each plaintiff will suffer irreparable injury and damage for which it has no adequate remedy at law.

29. Issuance of a temporary injunction enjoining defendant from implementing and enforcing Chapter 268 will cause no injury to defendant and will maintain the status quo during the pendency of this action.

WHEREFORE, plaintiffs pray for judgment and decree of this Court as follows:

a. Declaring that Laws of Minnesota 1977, Chapter 268, is null and void and unenforceable.

b. Temporarily and permanently enjoining defendant and any agency, political subdivision or individual acting or purporting to act on behalf of the defendant, from implementing or attempting to enforce, by civil or criminal action, or otherwise, the provisions of Chapter 268.

c. Granting to plaintiffs such other relief as may be just and equitable, including their costs.

BRIGGS AND MORGAN
By LEONARD J. KEYES
DOUGLAS L. SKOR
Attorneys for Plaintiffs
2200 First National Bk. Bldg.
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(612) 291-1215

(Summons and Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District
(Title Omitted in Printing)

DEFENDANT'S NOTICE AND MOTION TO DISMISS

To: All Plaintiffs and their attorneys, Briggs and Morgan, Leonard J. Keyes, Esq. and Douglas L. Skor, Esq., 2200 First National Bank Building, St. Paul, Minnesota 55101.

PLEASE TAKE NOTICE that on the 29th day of November, 1977, at 9:30 a.m. or as soon thereafter as counsel may be heard, in room 1109 of the Ramsey County Courthouse, St. Paul, Minnesota, respondents will move for an order dismissing the Complaint for Declaratory Judgment herein. The grounds for this motion are:

1. The Complaint fails to state a claim upon which relief may be granted;

2. Plaintiffs, and each of them lack proper legal status or standing to assert or maintain the purported claims in their complaint;

3. There exists no justiciable case or controversy between plaintiffs and defendant. Rather the Complaint, on its face, amounts to no more than a petition for an advisory opinion of the Court; and

4. The Court lacks jurisdiction over the subject matter of this action.

This motion is made pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure and is based upon all of the files

and records of the proceeding herein including a memorandum of law to be hereinafter submitted.

Dated: October 18, 1977

WARREN SPANNAUS
Attorney General
State of Minnesota
By BYRON E. STARNS
Chief Deputy
Attorney General
and
KENNETH E. RASCHKE, Jr.
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State of Minnesota

(Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District
(Title Omitted in Printing)

ORDER

The above matter came on for hearing before the undersigned Judge of the District Court at a Special Term on November 29, 1977.

Byron E. Starns, Esq., Chief Deputy Attorney General, and Kenneth E. Raschke, Jr., Assistant Attorney General, appeared on behalf of the State. Leonard J. Keyes, Esq., and Douglas L. Skor, Esq., of Briggs & Morgan, appeared on behalf of Plaintiffs. Thomas V. Bender, Esq., of Peterson, Popovich, Knutson & Flynn, appeared amicus curiae.

The parties appeared on the State's motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

The matter was duly argued on behalf of the Petitioner and Respondents. Memoranda were submitted by the parties, including amicus curiae. The Court, having in mind the arguments of counsel, bases the following order on all proceedings, files and records herein. Now, therefore,

IT IS ORDERED the State's motion to dismiss is hereby denied.

SYDNEY P. ABRAMSON
Judge of District Court

Dated: December 20, 1977.

MEMORANDUM

To withstand the State's motion to dismiss, Plaintiffs need only state a claim upon which relief can be granted. MRCP 12. Plaintiffs allege that the statute in question lacks a rational basis and should be declared unconstitutional. As assumptions and inferences to be drawn from the allegation must be viewed in favor of the Plaintiffs, nothing more is required. *Abbariao v. Hamline University School of Law*, —— Minn. ——, 258 N.W.2d 108 (1977); *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963).

The remarks of the State and amicus as to the scope and presumptions of a statute's rational basis are not within the consideration of the Court under this motion.

SPA

STATE OF MINNESOTA DISTRICT COURT
County of Ramsey Second Judicial District

(Title Omitted in Printing)

DEFENDANT'S ANSWER

The State of Minnesota for its Answer to the Complaint in the above captioned matter:

A. Denies every allegation contained in the Complaint except as otherwise herein admitted or otherwise qualified.

B. Admits the allegations contained in paragraphs 1, 18 and 19.

C. With respect to paragraphs 2, 4, 6 and 10, admits that the corporations named therein are organized and exist under Minnesota law; and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in those paragraphs.

D. With respect to paragraph 3, admits that Phillips is a Delaware corporation, and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of that paragraph.

E. With respect to paragraph 5, alleges that it is without knowledge sufficient to form a belief as to the truth of the allegations contained therein and further alleges that it believes that Hoover Ball and Bearing Company does not have a certificate of authority to do business in the State of Minnesota pursuant to Minn. Stat. ch. 303 (1976).

F. With respect to paragraph 8, alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained therein and alleges further that it is informed and believes that no trade name of "Johnson Star Market" has been filed with the Clerk of District Court in Anoka County pursuant to Minn. Stat. §§ 333.01-333.06 (1976).

G. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7, 9, 11, 12, 13, 14, 15, 16 and 17.

H. With respect to paragraphs 21, 23 and 25, realleges its answer contained in paragraphs A. through G.

SEPARATE DEFENSES

In addition, Defendant asserts the following separate defenses:

I. The Complaint fails to allege facts sufficient to state a claim upon which Relief may be granted.

J. There exists no justiciable case or controversy between plaintiffs and defendant. Rather the Complaint, on its face, amounts to no more than a petition for an advisory opinion of the Court in the face of an upcoming legislative session.

K. Neither Uniloy nor Hoover Ball and Bearing Company is entitled to maintain an action in Minnesota without a certificate of authority to transact business therein.

L. Dennis Johnson d/b/a Johnson Star Market is not entitled to maintain an action with respect to such business unless and until a certificate and proof of publication thereof are filed as required by Minn. Stat. §§ 333.01-333.06 (1976).

M. Plaintiffs, and each of them, lack standing to assert or maintain the purported claims in their complaint.

N. Plaintiff The Society of the Plastics Industry, Inc. is not a real party in interest to this action nor a person authorized to seek declaratory relief pursuant to Minn. Stat. § 555.02 (1976).

O. Minn. Laws 1977, Ch. 268 is in all respects constitutional and enforceable.

P. Plaintiffs have failed to join parties necessary to the granting of the relief sought in the Complaint.

WHEREFORE, defendant prays that the Court enter its judgment:

1. Dismissing Plaintiffs' Complaint;

2. Declaring that Minn. Laws 1977, ch. 268 is in all respects valid and enforceable;

3. Denying Plaintiffs all relief prayed for in their Complaint;

4. Granting Defendant its costs and disbursements herein.

Dated: January 4, 1978.

Respectfully submitted,

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(Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

CLOVER LEAF CREAMERY COMPANY,
PHILLIPS PETROLEUM COMPANY,
MARIGOLD FOODS, INC.,
UNILOY DIVISION OF
HOOVER UNIVERSAL, INC.,
WEBER & BARLOW STORES, INC.,
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
WELLS DAIRY, INC., and
M-H PACKAGING SYSTEMS, INC.

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

This matter was tried by the Court without a jury commencing March 15 and concluding March 21, 1978. Plaintiffs appeared by their attorneys, Leonard J. Keyes, Esq., and Douglas L. Skor, Esq.; defendant, by its attorneys, Byron E. Starns, Esq., Deputy Attorney General and Kenneth E. Raschke, Jr., Esq., Assistant Attorney General.

Upon the evidence adduced at the trial and all of the files and records herein, including the memoranda submitted by counsel, the Court makes the following as

FINDINGS OF FACT

1. The Court has jurisdiction over the parties and the subject matter; a justiciable controversy exists.

2. Plaintiff Clover Leaf Creamery Company ("Clover Leaf"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interestate commerce. It owns equipment which blow-molds plastic milk containers which are not intended to be returned to the retailer for refilling with milk ("nonreturnable, nonrefillable"). It utilizes these containers for marketing of Clover Leaf products, including milk, and also sells them to other dairies for marketing their respective products, including milk.

3. Plaintiff Marigold Foods, Inc. ("Marigold"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interstate commerce. It is the lessor of equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for marketing its products, including milk. It has packaged and distributed milk in such containers in Minnesota and elsewhere since 1973.

4. Plaintiff Phillips Petroleum Company ("Phillips"), a Delaware corporation, manufactures polyethylene resin and distributes it in interstate commerce to Minnesota customers, including Clover Leaf. This resin is the material used for the blow-molding of nonreturnable, nonrefillable plastic milk containers.

5. Plaintiff Hoover Ball & Bearing Company has recently changed its corporate name to Hoover Universal, Inc. Plaintiff Uniloy Division of Hoover Universal, Inc. ("Uniloy"), a Michigan corporation, manufactures and sells blow-molding equipment and assessories for the production of nonreturnable, nonrefillable plastic milk containers. It is engaged exclusively in interstate commerce in its Minnesota activities. It has manufactured and sold all of the blow-molding equipment presently utilized in Minnesota for the fabrication of nonreturnable, nonrefillable milk containers.

6. Plaintiff The Society of the Plastics Industry, Inc., ("SPI"), a New York nonprofit corporation, is the principal trade association for the United States plastic industry. It includes in its membership corporation engaged in the production of polyethylene resins, the manufacture and sales of blow-molding equipment and the fabrication of nonreturnable, nonrefillable plastic milk containers. Its members are principally engaged in interstate commerce.

7. Plaintiff Wells Dairy, Inc. ("Wells"), an Iowa corporation, is engaged in the distribution of milk and milk products in interstate commerce in Minnesota and elsewhere. It owns equipment in Iowa which blow-molds nonreturnable, nonrefillable plastic milk containers for such distribution. It has distributed milk in Minnesota in such containers since 1973.

8. Plaintiff M-H Packaging Systems, Inc., ("M-H"), a Minnesota Corporation, has a plant in Ramsey County, Minnesota. In that plant it owns equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for sale to dairies in Minnesota and in interstate commerce.

9. Plaintiff Weber & Barlow Stores, Inc., ("Barlow"), a Minnesota corporation, is engaged in the retail grocery business in Rochester, Minnesota and in outlets in Iowa and North Dakota. Among its products for retail sale is milk packaged in nonreturnable, nonrefillable plastic containers.

10. Plaintiff Dennis Johnson, d/b/a Johnson Star Market ("Johnson") has sold his retail grocery business since this action has been filed and is no longer a real party in interest.

11. In 1977, the Minnesota Legislature enacted a criminal statute, Laws of Minnesota 1977, Chapter 268 (coded as Sections 116F.21 and 22, MSA). Chapter 268 provides:

> "Section 1. (116F.21) (Milk packaging, statement of policy.) The legislature finds that the use of nonre-

turnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature, therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.

Section 2. (116F.22) (Prohibitions) Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk products as defined in Minnesota Statutes, Section 32.291, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, non-refillable rigid or semi-rigid container at least 50 percent of which is plastic.

Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense."

Laws of Minnesota 1977, Chapter 455, Section 96, provided that the effective date of Chapter 268 is July 1, 1978.

12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.

13. In enacting Chapter 268, the Legislature's published purpose was to discourage the use of nonreturnable, nonrefillable milk containers and encourage the use of returnable milk containers.

14. Chapter 268, if implemented, would not encourage the use of returnable milk containers. It would increase the use of a more expensive and environmentally harmful nonreturnable, nonrefillable paperboard container.

15. In enacting Chapter 268, the Legislature purported to find that the use of nonreturnable, nonrefillable plastic milk containers:

a. Presents a solid waste management problem.

b. Promotes energy waste and depletes natural resources.

16. There is no basis in fact for these findings in the light of Chapter 268's effect of promoting the greater use of paperboard milk containers because:

a. The nonreturnable, nonrefillable plastic milk containers in use today present fewer solid waste management problems than do paperboard containers. Their quantitative contribution to the solid waste stream is miniscule.

b. The plastic milk containers constitute a stable, inert contribution to the landfills. They incinerate almost completely with nonnoxious emissions. They provide approximately 20,000 BTU's of heat during incineration and permit total combustion of other waste products. On the other hand, paperboard milk cartons decay in landfills and contribute to landfill instability, permit seepage of leachate into underground water supplies and produce inflammable and explosive methane gas. They provide approximately 7,000 BTU's of heat during combustion and emit a small amount of noxious gases into the atmosphere.

c. As long as there is petroleum, there will be polyethylene, a petroleum by-product which is used for many purposes in addition to the manufacture of milk containers. Both petroleum and wood are natural resources subject to depletion from innumerable sources, one of the least being milk containers.

17. In enacting Chapter 268, the Legislature purported to rely on a number of policy goals found in Section 116F.01, M.S.A.:

a. To encourage the reduction of the amount and type of materials entering the solid waste stream.

b. To encourage the reuse and recycling of materials.

c. To encourage the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

18. Chapter 268, if implemented, will not succeed in effecting the Legislature's published policy goals because nonreturnable, nonrefillable plastic milk containers will be substantially replaced on the market by nonreturnable, nonrefillable paperboard milk containers. The effects of this replacement on the published goals are:

a. Reduction of the amount and types of materials entering the solid waste system is not encouraged. Gallon paperboard containers weigh almost twice as much as gallon plastic containers and have a greater volume; they occupy substantially the same amount of landfill space after compaction and are coated with polyethylene.

b. Reuse and recycling of materials is not encouraged. Nonreturnable, nonrefillable plastic milk containers are recyclable. Nonreturnable, nonrefillable paperboard milk containers are neither reusable nor recyclable.

c. Chapter 268 does not address the subject of encouraging the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

19. Chapter 268 does not serve a public purpose.

20. The means chosen by Chapter 268 bear no rational relation to the public purpose purported to be served.

21. Chapter 268 is an unreasonable, arbitrary and capricious interference with the production, marketing and consumption of milk and milk products to the detriment of each of the plaintiffs and many members of plaintiff SPI.

22. Chapter 268 bans only nonreturnable, nonrefillable plastic containers of milk and certain milk products. It does not affect any other milk container or any package of any other substance whatsoever. This classification is unreasonable and arbitrary. It bears no rational relationship to the purported objects of Chapter 268.

23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268.

24. The substantial burdens imposed on interstate commerce by Chapter 268 are impermissible. For example, Chapter 268, if implemented, would effectively prevent:

a. Plaintiff Wells and all out of state dairies who market milk in Minnesota in interstate commerce from marketing it in Minnesota in nonreturnable, nonrefillable plastic containers.

b. Plaintiff Clover Leaf from marketing milk interstate in nonreturnable, nonrefillable plastic containers or marketing such containers interstate.

c. Plaintiff M-H from marketing such containers interstate.

d. Plaintiff Uniloy and all other out of state manufacturers and distributors of blow-molding equipment in interstate commerce from selling such equipment in Minnesota for the purpose of fabricating nonreturnable, nonrefillable plastic milk containers.

e. Plaintiff Phillips and all other out of state suppliers of polyethylene resin in interstate commerce from selling their product in Minnesota for the purpose of fabricating non-returnable, nonrefillable plastic milk containers.

From the foregoing Findings of Fact, the Court makes the following as

CONCLUSIONS OF LAW

1. Chapter 268 deprives each of the plaintiffs and many members of plaintiff SPI of substantive due process of law in contravention of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

2. Chapter 268 deprives each of the plaintiffs and many of the members of plaintiff SPI of the equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

3. Chapter 268 constitutes an unreasonable burden on interstate commerce conducted by plaintiffs and many members of plaintiff SPI in contravention of Article I, Section 8, United States Constitution.

4. If Chapter 268 becomes effective, each plaintiff and many members of plaintiff SPI will suffer irreparable injury and harm for which none has an adequate remedy at law.

5. Laws of Minnesota, 1977, Chapter 268, is null, void and unenforceable.

6. Defendant State of Minnesota and its agencies, political subdivisions and individuals acting or purporting to act on its behalf are permanently enjoined from implementing or attempting to enforce by civil or criminal action or otherwise the provisions of Laws of Minnesota, 1977, Chapter 268.

7. Plaintiffs are entitled to recover from defendant their costs and disbursements.

8. The attached Memorandum shall be deemed to be a part of the Findings of Fact and Conclusions of Law herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: This 5th day of April, 1978.

DAVID E. MARSDEN
Judge of District Court

MEMORANDUM

The standards by which constitutionality of the statute must be determined are well settled.

Chapter 268 is clothed with a presumption of validity and may not be struck down unless its infirmity has been established beyond a reasonable doubt.

Likewise, a Court may not substitute its judgment for that of the legislature as to the wisdom or desirability of the act.

The plaintiffs have satisfied the burden imposed upon them.

No other jurisdiction in the entire country has enacted legislation comparable to Chapter 268.

New York City enacted a city ordinance imposing a tax solely on plastic containers. That gave rise to *Society of Plastics Industry v. New York City*, 3 ERC 1370 (1971) where the trial court, in a comprehensive opinion, held the ordinance unconstitutional.

No controlling appellate decision exist.

The relevant legislative history of Chapter 268 support a conclusion that the real basis for it was to serve certain economic interests (paper, pulpwood, and some dairies) at the expense of other competing economic groups (plastic and certain dairies) by prohibiting the plastic milk bottle.

If, indeed, there were substantial environmental factors favoring the use of the paper milk carton, an entirely different situation would be presented. Such is not the case.

Despite the laudable purposes to which the statute purports to address itself, the evidence overwhelming establishes that the enunciated goals will not be achieved.

The history of the use of returnable bottles, both nationally and locally, is revealing. The trends of public acceptance clearly establish a marked preference for nonreturnable forms of packaging.

The evidence presented in this case requires the conclusion that banning plastic containers will only increase the use of paper containers. Defendant has offered no credible evidence showing that an increased use of returnables would be realized.

Thus, reliance on compared superiority of returnables versus nonreturnables, as it affects the problems of post consumer solid waste, as a means of justifying the statute, is without persuasive effect.

Considerable testimony was presented as to the relative merits of plastic versus paper containers. Certain expert witnesses appeared for the plaintiffs and defendant. Numerous exhibits were received.

The Court, as fact-finder, is obliged to weigh and evaluate this evidence, much of which was in sharp conflict. The opinions of witnesses appearing for the plaintiffs are deemed to be entitled to great weight. They were supported by impartial indepth studies done by the Midwest Research Institute for the United States Environmental Protection Agency.

Defendant's experts, on the other hand, expressed opinions which were not persuasive. The foundation for those views was weak and inconclusive. Indeed, "qualitative" factors were emphasized beyond the "quantitative" factors. They were acknowledged to be more judgmental in nature. The opinions ignored certain relevant factors and placed undue

emphasis on other factors, and thus lacked convincing quality.

In *Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W. 2d 144, 157-158 (1975), our Supreme Court set out the substantive process requirements of a statute as follows:

> "(1) That the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served."

Mere assertions in the preamble of the statute will not save its constitutionality, when as here, its effects are arbitrary and unreasonable. The additional requirements of "rational relation" is likewise absent.

Plaintiffs have established a violation of their constitutionally protected due process rights.

For similar reasons the statute violates equal protection rights which require that affected classifications be reasonable, not arbitrary, and based upon differences having a fair and substantial relation to the object of the legislature.

Reed v. Reed, 404 U.S. 71, 76 (1971)

Plaintiffs have argued as follows:

"The State has singled out the plastic milk container. It has done nothing to reduce or eliminate the use of the other nonreturnable container of the same product which is more environmentally harmful. It has done nothing to regulate the use of containers of other products which pose more immediate problems, such as littering, and which contribute huge volumes to the solid waste stream. It has done nothing about the use of the very same plastic container, by the very same dairies and stores, for fruit juices. It has done nothing about the myriad nonreturnable, nonrefillable plastic containers used to package non-food products. With no rational basis for

its action, it has simply deprived the dairy industry and the consumer of the best container ever devised for milk."

I concur.

Finally, the statute impedes the flow of interstate commerce without providing adequate offsetting local benefits. This is especially true as respects the wholesalers and distributors of milk and ultimately the dairy farmers who sell their product to plaintiffs such as Clover Leaf, Marigold and Wells. They are placed in a disadvantaged position in the market. The highly competitive nature of the milk industry must be acknowledged and taken into account.

In *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 97 S.Ct. 2434, 2446 (1977), the U.S. Supreme Court said

> "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."

Here the "local benefits" have been shown to be illusory or insubstantial, except for the economic advantages provided the paper and pulpwood industry.

In addition to these claims, plaintiffs have also asserted the statute is so vague, indefinite and ambiguous that its applications and enforcement are left to arbitrary determinations.

In view of the determinations as set forth herein, it is unnecessary to reach or determine the vagueness argument.

D.E.M.

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

CLOVER LEAF CREAMERY COMPANY,
PHILLIPS PETROLEUM COMPANY,
MARIGOLD FOODS, INC.,
UNILOY DIVISION OF
HOOVER UNIVERSAL, INC.,
WEBER & BARLOW STORES, INC.,
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
WELLS DAIRY, INC., AND
M-H PACKAGING SYSTEMS, INC.

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

JUDGMENT ROLL

Pursuant to the Findings Of Fact, Conclusions Of Law and Order For Judgment, Marsden, J., dated and filed April 5, 1978 which states the following:

1. Chapter 268 deprives each of the plaintiffs and many members of plaintiff SPI of substantive due process of law in contravention of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

2. Chapter 268 deprives each of the plaintiffs and many of the members of plaintiff SPI of the equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

3. Chapter 268 constitutes an unreasonable burden on interstate commerce conducted by plaintiffs and many members of plaintiff SPI in contravention of Article I, Section 8, United States Constitution.

4. If Chapter 268 becomes effective, each plaintiff and many members of plaintiff SPI will suffer irreparable injury and harm for which none has an adequate remedy at law.

5. Laws of Minnesota, 1977, Chapter 268, is null, void and unenforceable.

6. Defendant State of Minnesota and its agencies, political subdivisions and individuals acting or purporting to act on its behalf are permanently enjoined from implementing or attempting to enforce by civil or criminal action or otherwise the provisions of Laws of Minnesota, 1977, Chapter 268.

7. Plaintiffs are entitled to recover from defendant their costs and disbursements.

Now, on motion of Leonard J. Keyes, said Attorney, IT IS HEREBY ADJUDGED that judgment is entered in favor of the Plaintiffs in the manner as stated above (Plaintiffs waive costs and disbursements)

Signed this 7th day of April A.D. 1978

HAZEL G. ARTH
Clerk
By NELL M. MONTGOMERY
Deputy Clerk

STATE OF MINNESOTA DISTRICT COURT
County of Ramsey Second Judicial District

(Title Omitted in Printing)

NOTICE OF APPEAL

To: Leonard J. Keyes and Douglas L. Skor, Attorneys for Plaintiffs:

PLEASE TAKE NOTICE, that the defendant, State of Minnesota, appeals to the Supreme Court of the State of Minnesota from the Judgment of the District Court entered on April 7, 1978 in the above-captioned matter.

Dated April 10, 1978.

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STATE OF MINNESOTA
IN SUPREME COURT
No. 48827

CLOVER LEAF CREAMERY COMPANY, et al.,
Respondents,

vs.

STATE OF MINNESOTA,
Appellant.

Peterson, J.
Dissenting,
Wahl, J.
Endorsed
Filed September 7, 1979
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Laws 1977, c. 268, which creates a statutory classification whereby plastic nonrefillable milk containers are banned and paper milk containers are preserved, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, because the classification is not rationally related to a legitimate state interest:

(a) The evidence conclusively demonstrates that in the categories of solid waste management, energy waste, and depletion of natural resources (matters of specific concern in the Act), the environmental effects of paper milk containers are not less harmful than the environmental effects of plastic nonrefillable milk containers; and

(b) The evidence further establishes that the classification will not promote the Act's stated goal of encouraging the use of refillable milk containers.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

PETERSON, Justice.

Defendant, state of Minnesota, appeals from the trial court's judgment in favor of plaintiffs,[1] holding L. 1977, c. 268 (the Act), to be unconstitutional.[2] We affirm the trial court's judgment and hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, because it establishes a classification which is not rationally related to a legitimate state interest.

The Act, approved on May 26, 1977, provides:

> "Section 1. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore,

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[1] Plaintiffs generally may be divided into two categories—those involved in the packaging and sale of milk; those involved in the production and sale of plastic goods and associated equipment.

The first category includes:

1. Clover Leaf Creamery Company.
2. Marigold Foods, Inc.
3. Wells Dairy, Inc.
4. Weber & Barlow Stores, Inc.

The second category includes:

1. The Society of the Plastics Industry, Inc.
2. Phillips Petroleum Company
3. Hoover Universal, Inc., formerly Hoover Ball and Bearing Company
4. M-H Packaging Systems, Inc.

[2] The trial court held L. 1977, c. 268, to be unconstitutional on three grounds:

(1) The act deprives plaintiffs of equal protection of the law in contravention of U. S. Const. Amend. XIV;

(2) The Act deprives plaintiffs of substantive due process of law in contravention of U. S. Const. Amend XIV and Minn. Const. art. 1, § 7; and

(3) The act constitutes an unreasonable burden upon interstate commerce in contravention of U. S. Const. art. I, § 8.

in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.[3]

"Sec. 2. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese and yogurt, in a non-returnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.

Subd. 2. A violation of Subdivision 1 is a misdemeanor and each day of violation is a separate offense.[4]

"Sec. 3. This act is effective July 1, 1977."[5]

We note three specific aspects of this unique statute:[6] (1) The Act does not, under any circumstances, permit the use of nonrefillable[7] plastic containers for milk;[8] (2) milk is the

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[3] Laws 1977, c. 268, § 1, codified as Minn. St. 116F.21.

[4] Laws 1977, c. 268, § 2, codified as Minn. St. 116F.22.

[5] Laws 1977, c. 455, § 96, superseded L. 1977, c. 268, § 3, and provided, in part: "Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, nonrefillable plastic containers shall be effective prior to July 1, 1978."

[6] Minnesota is the only state that has legislatively banned nonrefillable plastic milk containers. Ontario, Canada, has banned both plastic and paper nonrefillable milk containers by executive action.

[7] The Act mentions "nonreturnable, nonrefillable containers." A container can be returnable without being refillable. For example, the plastic milk bottle banned by the Act can be returned for recycling, but it cannot be used again to package milk. The term "nonrefillables" is therefore used throughout this opinion to describe milk containers which cannot be used again for the same purpose.

[8] The container referred to is a high density polyethylene plastic container which cannot be returned to the dairy to be refilled with milk for sale to consumers. For the remainder of the opinion, these containers will be referred to as "plastic nonrefillables."

only commodity affected by the Act, plastic containers are not banned unless they are filled with milk; and (3) only plastic nonrefillable milk containers are affected by the Act, paper nonrefillable milk containers are not affected.[9]

Plaintiffs contend the Act violates the equal protection clause of the Fourteenth Amendment because it creates a classification in which paper containers are to be preserved while plastic nonrefillables are to be banned. Because the present statute involves economic regulation, the relevant test is whether the classification is rationally related to a legitimate state interest. New Orleans v. Dukes, 427 U. S. 297, 96 S. Ct. 2513, 49 L. ed. 2d 511 (1976). Plaintiffs argue that a rational classification is not established because, from an environmental standpoint, paper containers are not superior to plastic nonrefillables, and a ban on plastic nonrefillables will serve to encourage the use of paper containers instead of serving to encourage the use of refillable milk containers.

The Act is intended to further the policies stated in Minn. St. 116F.01; therefore, it is intended to promote the state interests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream. L. 1977, c. 268, § 1. Specifically, the stated legislative finding of the Act is that nonrefillable milk containers present solid waste management problems, promote energy waste, and deplete natural resources; the stated legislative goal is that use of returnable milk containers should be

[9] The container referred to is a plastic coated, paperboard container which cannot be returned to the dairy to be refilled with milk for sale to customers. The container is composed of bleached kraft paper coated with low density polyethylene, a plastic related to that used in plastic nonrefillable milk containers. Low density polyethylene comprises about 10 percent of the weight of the container. For the remainder of the opinion, these containers will be referred to as "paper containers."

encouraged. L. 1977, c. 268, § 1. The Act, undoubtedly, deals with legitimate state interests. The crucial question is whether the classification separating paper containers from plastic nonrefillables is reasonably related to these state interests.

We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives. Considering only the specific areas of solid waste management, energy waste, and depletion of natural resources, it is clear that the environmental effects of paper containers are not less harmful than the effects of plastic nonrefillables. It is also apparent that the classification will not further the Act's stated goal of encouraging the use of refillable milk containers.

The record supports the trial court's finding that plastic nonrefillables present fewer solid waste management problems than paper containers. The major method of solid waste disposal is by landfill deposit. The evidence at trial established that plastic nonrefillables are superior to paper containers for landfill disposal.

Defendant's expert witnesses agreed that the principal environmental hazards posed by landfill disposal are pollution of underground water, which is caused by leaching, and the creation and escape of methane gas. Both of these environmental hazards are created by waste decomposition. Bacterial

and other chemical reactions, combined with percolation of water and other liquids, create leachates which seep into the ground and ultimately into underground water. The same reactions create methane gas, which is both noxious and explosive. Paper milk containers contribute to these environmental hazards because they begin to decompose as soon as the plastic coating on the exterior of the container is punctured or torn. Plastic nonrefillables are essentially inert and therefore do not contribute to the creation of leachates and methane gas.

Maintaining landfill stability is important in landfill disposal for two reasons. First, stability minimizes cracking of the final landfill cover. Such cracking results in the generation of leachates. Second, landfill stability encourages productive use of the landfill site after the landfill project is completed. Because waste decomposition creates landfill instability, plastic nonrefillables contribute to landfill stability while paper containers do not.

The trial court's finding that plastic nonrefillables and paper containers occupy substantially the same amount of landfill space is also justified by the evidence. Plastic nonrefillables contain less raw material and have greater density than paper containers. If total compaction (no void spaces left in containers) is achieved, plastic nonrefillables will occupy less landfill space. The evidence at trial demonstrated that during collection waste is typically compacted to a fraction of its original volume, that it is compacted further when deposited at the landfill, and that it has continual pressure exerted upon it as other layers of waste are deposited. Under these conditions, there is no basis for asserting that plastic nonre-

fillables occupy more landfill space than paper containers.[10]

Data in a 1977 final report by Midwest Research Institute (MRI) and the United States Environmental Protection Agency (EPA)[11] supports defendant's argument that plastic nonrefillables take more landfill space than paper containers; however, accuracy of the figures in the MRI report was persuasively attacked by plaintiffs' expert witnesses. Highly significant was the testimony of Richard Welch, a chief investigator involved in the MRI report. Welch indicated that in the first draft of the MRI report it was assumed, based upon conversations with experts, that plastic nonrefillables and paper containers would compress to within 10 percent of their original volume. The American Paper Institute then provided MRI with a study prepared by the Weyerhaeuser Corporation involving the compressibility of milk containers. The test used in the Weyerhaeuser study indicated that paper was superior to plastic. MRI incorporated the Weyerhaeuser finding in its final report because no other written documentation was available. Welch criticized the test conducted by Weyerhaeuser because it neglected to specify the weights of the containers

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[10] Plaintiffs provided a relevant demonstration of compaction during the cross-examination of defendant's solid waste expert, Harold Samtur. Counsel for plaintiff crushed samples of both containers with his bare hands. Samtur estimated that the crushed volume of each container was between 10 and 20 percent of its original volume. He further acknowledged that there was virtually no springback of the plastic nonrefillable after it had been crushed and released and that the springback which did occur could be eliminated by squeezing the container between thumb and forefinger.

[11] The report, entitled "Resource and Environmental Profile Analysis of Five Milk Container Systems," was an objective quantification of resource and environmental impacts associated with five milk container systems, including paper containers and plastic nonrefillables, and was the primary source of documentary evidence at trial on the environmental effects of paper containers and plastic nonrefillables. For the remainder of this opinion, the report will be referred to as the "MRI report."

used and because the test was conducted in a laboratory, not under conditions approximating those found in a landfill.[12] William E. Ades of the EPA testified that he too was less confident of compressibility figures in the MRI report than of figures in other categories of container comparison. Welch further testified there was insufficient evidence to conclude that either type of container would consume more landfill space than the other. The contrary conclusion of defendant's solid waste expert, Harold Samtur, was based upon a weak and inconclusive foundation[13] and, as the trial court indicated, lacked convincing quality.

Solid waste disposal is also achieved by incineration, a method of disposal in which plastic nonrefillables are superior to paper containers. Although currently not widespread, incineration will become more prevalent as technology advances and the energy value of the heat generated by it can be economically utilized. Both plastic nonrefillables and paper containers burn, but plastic nonrefillables have a much higher Btu value, which results in the recovery of more energy than

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[12] In this test, the volume of a container was measured after the container was crushed with a laboratory device and the device was totally released, with no continual pressure exerted upon the container. The evidence at trial indicated waste is compacted to a fraction of its original volume during collection, is compacted even further when deposited at a landfill, and has continual pressure exerted upon it as other layers of waste are deposited.

[13] Harold Samtur relied upon three sources for his conclusion: One, the MRI report. (Samtur accepted the compressibility figures of the MRI report without examining their derivation, in spite of Welch's testimony about their inadequacy.) Two, a 1972 report prepared by a milk packaging working group for the Ministry of the Environment in the Province of Ontario, Canada. (The Ontario researchers estimated the compaction ratio for a refillable plastic milk container and then assumed that the much lighter plastic nonrefillable would consume the same space. The group also used a nonrefillable plastic milk container incomparable to the container now used in Minnesota, because it was almost 50 percent heavier and was more difficult to crush.) Three, a 1969 study, the "Eggshell Report," on the disposable characteristics of containers. (The study did not include samples of milk containers.)

can be recovered from burning paper containers. Moreover, plastic nonrefillables incinerate completely and do not emit noxious gases into the atmosphere, while paper containers leave residue and emit small amounts of noxious gases.

Recycling is yet another method of solid waste disposal. One of the express purposes of Minn. St. c. 116F is to encourage the reuse and recycling of materials. Plastic nonrefillables are recyclable because they can be ground and used to make a large number of polyethylene products.[14] Paper containers are not recyclable because the paperboard and the plastic coating cannot be separated.

"Source reduction" is a further aid in solid waste management and is similarly an express goal of Minn. St. c. 116F. In the present case, the major relevant source-reduction factor is the constantly declining weight of plastic nonrefillables. Plastic nonrefillables weigh a fraction more than half the weight of paper containers and therefore generate less waste. While the unit weight of gallon paper containers has remained at 115 grams or more for at least the past 5 years, improvements in resin, production machinery, and container design have brought about substantial reduction in the weight of plastic nonrefillables.[15] Such a reduction in weight causes a

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[14] The evidence indicates that plaintiff Clover Leaf Creamery Company has a voluntary plastic milk container recycling program. Clover Leaf picks up plastic milk containers that are returned to retail stores, grinds them, and sells the plastic material to a salvage dealer.

[15] In 1964, gallon plastic nonrefillables made on blow-molding machines manufactured by plaintiff Hoover Universal, Inc. weighed 100 grams per unit. By 1973, plastic nonrefillables generally used in the dairy industry weighed 70 grams each, the weight used in the MRI report. Blow-molding machines are currently manufactured to mold 60-gram bottles. The average weight used throughout the country, including Minnesota, is currently 65 grams. One Hoover dairy customer presently uses 57-gram containers.

proportional decrease in the amount of raw material used and the amount of waste generated, along with lessened impacts in other environmental categories.[16]

The evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers.

Similarly, in the category of energy waste, the evidence establishes that paper containers are not superior to plastic nonrefillables. While the figures in the MRI report on energy consumption support defendant's position that less energy is required to produce paper containers, the accuracy of the figures was successfully eroded by plaintiffs. Computed in the MRI report were two values for the amount of energy consumed in the production of paper containers. The higher figure included, while the lower figure excluded, the energy value of the wood waste (wood bark and sawdust) generated by the paper manufacturing process. When MRI included the energy value derived from burning wood waste (resulting in a higher figure and a higher level of adverse environmental impact), paper containers were slightly superior to plastic nonrefillables. When MRI did not include the energy value derived from burning wood waste (resulting in a lower figure and a lower level of environmental impact), paper containers were superior. However, MRI's figures for plastic nonrefillables did not take into consideration the effect of the energy value of the waste gases produced in making high density polyethylene. Welch, a chief investigator in the MRI report, testified that a meaningful comparison between plastic

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[16] Defendant argues that some reduction will occur under the Act, because use of refillable milk containers will be encouraged. As discussed later in this opinion, the evidence conclusively demonstrates that increased use of refillable milk containers will not be the result of a ban on plastic nonrefillables.

nonrefillables and paper containers in the category of energy consumption requires inclusion of wood waste energy in computing the amount of energy consumed in producing paper containers. Welch's testimony was properly credited by the trial court.[17] In its tests, MRI used plastic nonrefillables weighing 70 grams. The average weight of plastic nonrefillables now used in Minnesota is 65 grams. If 65-gram plastic nonrefillables are used and the energy value derived from burning wood waste is included in energy consumption figures for paper containers, the figures demonstrate that production of plastic nonrefillables requires less energy than production of paper containers.[18]

The evidence introduced at trial therefore demonstrates that production of plastic nonrefillables does not require more energy than production of paper containers. The evidence also establishes that the amount of oil and natural gas consumed in the production of high density polyethylene for plastic nonrefillables is negligible and that banning plastic nonrefillables will not increase the volume of natural gas or oil presently marketed for heating or fuel purposes. Thus, drawing a distinction between plastic nonrefillables and paper containers

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[17] The evidence at trial indicated that the petroleum industry has, for years, used waste gases to fuel or power various processes. However, it is difficult to pinpoint what amount of energy used in petrochemical processing represents waste energy. The plastics industry generally does not break down the sources of energy used in these processes, because it would be extremely difficult to engage in such an inquiry.

[18] Furthermore, the evidence demonstrates that if the energy value of raw material in each container is excluded or included in determining the amount of energy needed to produce the container, plastic nonrefillables are environmentally superior to paper containers.

Richard Welch, a chief investigator for MRI, concluded that the energy impact of plastic nonrefillables and paper containers is virtually the same.

is not reasonably related to the state's interest in preventing energy waste.

Furthermore, drawing a distinction between plastic nonrefillables and paper containers is not reasonably related to the state's interest in conserving natural resources. In spite of the fact that timber is considered to be a renewable resource and oil and natural gas are considered to be nonrenewable resources, the evidence demonstrates that banning plastic nonrefillables will not result in lower consumption of natural resources. The amount of crude oil and natural gas used for producing plastic nonrefillables is so small that a ban on plastic nonrefillables will not alter the volume of resources consumed for non-fuel purposes. If any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable. The record establishes that the weight of plastic nonrefillables is continually being reduced and that plastic nonrefillables are recyclable.[19]

The evidence conclusively establishes that the stated goal of the Act, to encourage or promote a return to the use of refillable milk containers, will not be furthered by banning plastic nonrefillables. In 1977, plaintiff Clover Leaf Creamery Company made an effort to revive refillable milk containers in Minnesota and found that consumers would not purchase milk in refillable bottles, even when the only alternatives in some instances were paper containers. Clover Leaf was forced

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[19] When other environmental factors are considered, the superiority of plastic nonrefillables is more evident. For example, the MRI report analyzed factors in addition to energy and compressibility. Using 70-gram plastic nonrefillables, the study demonstrated that production of paper containers (1) consumes more water; (2) generates more water-borne waste; (3) consumes greater quantities of raw materials; and (4) generates more industrial solid waste than plastic nonrefillables. However, the MRI report indicated that paper containers are environmentally superior in the category of atmospheric emissions.

to take back large quantities of milk and finally sold several thousand unused refillable containers at a loss. The rejection of refillable containers occurred even though the cost to retailers was 4 cents less per gallon for returnable containers than for nonrefillable containers and even though thousands of dollars were spent in promoting refillable milk containers. The evidence also indicated that in Ontario, where both plastic nonrefillables and paper containers were administratively banned in 1972, consumers have turned to a third nonrefillable container, the "plastic pouch," as an alternative to refillable containers. Whereas 47 percent of the milk containers used in Ontario in 1971 were refillable, in 1977, the percentage was 19.7.

The evidence demonstrates that convenience is an important factor for consumers and that consumers will therefore use paper containers instead of refillables if plastic nonrefillables are banned. The environmental effects of producing, using, and disposing of paper containers are not less harmful than the environmental effects associated with plastic nonrefillables.

Defendant argues that even if it is assumed that paper containers are not environmentally superior to plastic nonrefillables, the classification drawn in the Act is rationally related to another legitimate state interest — prohibiting the use of plastic nonrefillables before a significant foothold is acquired in the Minnesota milk market.

Defendant argues that the Act was initiated in response to a move in late 1976 by major Minnesota dairies to a long term commitment to packaging milk in plastic nonrefillables. Defendant reasons that the undoubted consumer convenience of plastic nonrefillables combined with the capital investment in machinery designed to produce plastic nonrefillables and the

economic gains to be made by maximizing production would have effectively eliminated any likelihood that the Minnesota dairy industry would later voluntarily turn to refillable containers. Defendant also argues that because nationwide trends indicate plastic nonrefillables dominate in any milk market, it may have been the legislature's concern that if it failed to ban plastic nonrefillables, future regulation against plastic nonrefillables would become too disruptive economically and therefore impossible to achieve. In other words, defendant asserts that the legislature may have believed that if action was not taken to limit the introduction of plastic nonrefillables, they would become immovably entrenched in Minnesota. The evidence indicates, however, that in the early 1970's use of plastic nonrefillables had been established in many areas of Minnesota, excluding the Twin Cities metropolitan area.

The state interest asserted by defendant is, on this record, speculative and illusory. The gravamen of defendant's argument is that by presently banning plastic nonrefillables, the legislature will, in the future, be better able to promote environmentally sound milk packaging, such as refillable containers. However, the evidence at trial indicates that the Minnesota Pollution Control Agency does not presently plan to take or propose further action on the subject of milk containers. Similarly, action by the Minnesota Legislature is uncertain, if not highly doubtful. The original version of the Act included a provision banning paper containers, but that provision was eventually removed from the Act. There is no evidence, therefore, that paper containers will cease to be used in the Minnesota milk market. Because paper containers are not environmentally superior to plastic nonrefillables, any

asserted environmental benefit in preventing plastic nonrefillables from being widely used in Minnesota is illusory.

Defendant nevertheless contends that the Act should be upheld as a first step toward solving the overall problem of milk container waste. We do not doubt that legislatures may implement economic programs step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.ed 2d 828 (1966); Williamson v. Lee Optical Co. 348 U.S. 483, 75 S.Ct. 461, 99 L.ed 563 (1955). However, such a step must, at the very least, have a rational relationship to achievement of a legitimate state interest. In the present case, the result of the Act, at best, will not be a step toward amelioration of a perceived evil. The evidence is conclusive that paper containers are not environmentally superior to plastic nonrefillables.

We hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it establishes a classification which is not rationally related to a legitimate state interest.[20]

Affirmed.

WAHL, Justice (dissenting).

While I am persuaded by the evidence cited by the majority which indicates that plastic nonrefillables are no worse, from

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[20] The trial court treated plaintiffs' equal protection and substantive due process attacks as separate questions; but under substantive due process analysis, the means chosen by the challenged legislation similarly must bear a rational relation to the public purpose sought to be served. See, e.g., Federal Distillers, Inc. v. State, 304 Minn. 28, 46, 229 N. W. 2d 144, 158 (1975). The trial court also concluded that the Act constitutes an unreasonable burden on interstate commerce in contravention of art. I, § 8, of the United States Constitution; but because of our decision on equal protection grounds, we do not consider that issue.

an environmental standpoint, than paper nonrefillables, I cannot agree that the plastic nonrefillables ban, struck down today, is not "rationally related to a legitimate state interest." I view it as a constitutionally permissible "first step" in a pro-environmental effort on the part of the legislature.

The Court in New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.ed 511 (1976), upheld, *per curiam*, the constitutionality of a New Orleans ordinance prohibiting the sale of foodstuffs from pushcarts, except by vendors who had continually operated such a vending business within the French Quarter for 8 years. That classification effectively operated to disqualify all food vendors except two, and there was no reason to believe the two were more likely than any others to "preserve the traditions" of the French Quarter, the ordinance's alleged purpose. To the charge that the classification was "a totally arbitrary and irrational method of achieving the city's purpose," the Supreme Court answered:

> "* * * rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible." 427 U.S. at 305, 96 S.Ct. at 2517.

The court articulated the role of the judiciary with respect to legislative economic regulations as follows:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed. 2d 828 (1966), in such economic areas, adopting regulations that only par-

tially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g.*, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, *e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963)." 427 U.S. at 303-304, 96 S.Ct. at 2517.

Given such instruction by the highest court in the land, I fail to see how we can distinguish the milk container legislation struck down here from the pushcart vendor prohibition upheld in New Orleans v. Dukes. Regardless of the environmental superiority, found by the majority, of plastic over paper containers, the legislature is free to use a "stepwise" approach, adopting only a partial solution to the waste problem. The legislature could rationally conclude that allowing the plastic nonrefillables to become entrenched in Minnesota would hinder future efforts to force the dairy industry to utilize more environmentally acceptable containers.

The majority concludes that "further action on the subject of milk containers * * * by the Minnesota Legislature is uncertain, if not highly doubtful," citing as evidence the fact that an earlier version of the bill had contained a provision banning paper nonrefillables as well, which provision was eventually removed. However, it is at least arguable that such evi-

dence leads to precisely the opposite conclusion—the same conclusion which might be drawn from the following statements made by senators at the debates on the nonrefillables bill, transcribed and entered in the trial record as Exhibit J:

> "Senator Spear: '* * * It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another nonreturnable system with all the investment and all of the vested interest that is going to involve to begin.'" Full Senate Floor Discussion, 70th Legislature, May 20, 1977.
>
> "Senator Luther: '* * * the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. * * * There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.'" Full Senate Floor Discussion, 70th Legislature, May 20, 1977.

The U.S. Supreme Court has frequently observed that a step-by-step approach in economic regulation is permissible, see, e.g., New Orleans v. Dukes, *supra*; Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.ed 2d 828 (1966), and cases cited therein, and has never required actual evidence that a legislature intends to take a further step in the near future in the relevant economic area being regulated. Here, however, it is at least fair to conclude from the legislative history that the Minnesota legislature indeed intended that the bill banning plastic nonrefillables would be a "first step" in the environ-

mental effort. The U.S. Supreme Court's cautions are well taken here; it is not for this court "to judge the wisdom or desirability of legislative determinations" in this area of economic regulation.

The majority opinion, in its discussion of the Ontario experience with a ban on all nonrefillable milk containers, suggests that such a total ban was actually detrimental to environmental efforts, pointing to evidence that the market share of refillables has dropped since the ban was enacted. Trial evidence established, however, that the plastic pouch is clearly superior from an environmental standpoint to both plastic and paper nonrefillables. Thus, while the measure perhaps did not have precisely the effect intended, it nevertheless had salutary environmental impact. To suggest that such a total ban would not benefit the environment is not only contrary to the evidence; it undermines any attempts on the part of the legislature to proceed with "complete elimination of the evil," an effort of which the plastic nonrefillables was but the first step.

Because I believe that Chapter 268, here declared unconstitutional, was precisely the type of regulation which the U.S. Supreme Court sanctioned in New Orleans v. Dukes, I respectfully dissent from this court's holding that this measure denies equal protection. Having found that Chapter 268 withstands the equal protection challenge, I would further hold that it is not in violation of the commerce clause, Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.ed 2d 664, 674 (1978), or the due process clause, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125, 98 S.Ct. 2207, 2213, 57 L.ed 2d 91, 99 (1978); Federal Distillers, Inc. v. State, 304 Minn. 28, 38, 229 N.W. 2d 144, 154 (1975), but is a constitutional exercise of legislative powers.

STATE OF MINNESOTA
IN SUPREME COURT
(Title Omitted in Printing)

NOTICE OF MOTION AND MOTION FOR EXTENSION OF TIME TO PETITION FOR REHEARING

To: Clover Leaf Creamery Company, et al Respondents and their attorneys, Leonard J. Keyes, Esq. and Douglas L. Skor, Esq., 2200 First National Bank Building, St. Paul, Minnesota 55101.

Please take notice that the Appellant, State of Minnesota, hereby moves for an order of the Court granting Appellant an extension of time until October 5, 1979 to serve and file any petition for rehearing in the above entitled matter the decision of which was filed on September 7, 1979. This motion is made pursuant to Rules 126, 127 and 140, Rules of Civil Appellate Procedure.

The reason for this motion is to enable the Appellant carefully to assess the decision in this case together with that in Can Manufacturers Institute, Inc., et al. v. State, et al. No. 371, filed therewith, to consider the need to file a petition for rehearing and properly to prepare a petition which clearly advises the Court of controlling legal principles, material facts and material questions which the Court has, in Appellant's opinion, failed to consider, misapplied or misconceived.

It is Appellant's understanding that Respondents have no objection to the granting of this motion.

Dated: September 13, 1979.

Respectfully submitted,
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(Affidavit of Service Omitted in Printing)

STATE OF MINNESOTA
IN SUPREME COURT
(Title Omitted in Printing)
REFEREE'S FINDINGS AND RECOMMENDATIONS AND ORDER

The above entitled matter came on for hearing before the undersigned as Referee upon motion made pursuant to the provisions of Rule 127, Rules of Civil Appellate Procedure, by Byron E. Starns and Kenneth E. Raschke, Jr., attorneys for appellant for an extension of time for service and filing of a petition for rehearing and

Good cause having been shown, it is recommended that the time for the service and filing of a petition for rehearing be extended to include October 5, 1979.

Dated: September 18, 1979

Referee

IT IS HEREBY ORDERED that the time for the service and filing of a petition for rehearing be extended to include October 5, 1979.

Dated: September 18, 1979

By the Court:

Associate Justice

(The Petition of the Defendant-Appellant for Rehearing, filed Oct. 5, 1979, is omitted in printing because, pursuant to Rule 140 of the Minnesota Rules of Civil Appellate Procedure, such a petition is in substance a brief or memorandum of law. The affidavit of service of the petition is similarly omitted in printing.)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.
October 31, 1979

CLOVER LEAF CREAMERY COMPANY, et al,
Respondents,

vs.

STATE OF MINNESOTA,
Appellant.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
JOHN McCARTHY
Clerk Supreme Court

STATE OF MINNESOTA, SUPREME COURT

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTIC INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Respondents,

vs.

STATE OF MINNESOTA,

Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

Dated and Signed October 31, 1979

By the Court:

Attest:

JOHN McCARTHY

Clerk

(Clerk's certification omitted in Printing)

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

QUESTION PRESENTED

Did the Minnesota Supreme Court err in invalidating a legislative ban on the sale of milk in nonreturnable, nonrefillable plastic containers as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, where the factual record established that the classification was not rationally related to a legitimate state interest?

STATEMENT OF THE CASE

The Minnesota Legislature enacted a unique criminal statute, Minn. Laws 1977, Ch. 268 ("Act") which banned the sale of milk in Minnesota in nonreturnable, nonrefillable plastic containers. The Act did not affect the sale of any other products in plastic containers, such as windshield washer fluid, fruit juices (which are sold in the same plastic containers by the same dairies that use plastic containers for milk), and laundry bleach. It did not affect the sale of milk in the only other type of nonreturnable container used for milk in Minnesota, the plastic-coated paper carton.

After trial involving the resolution of complex factual issues, the District Court for Ramsey County, Minnesota (David Marsden, J.) found the Act constitutionally deficient in that it deprived plaintiffs of substantive due process, denied them equal protection of the laws, and constituted an unreasonable burden on interstate commerce.

The Minnesota Supreme Court affirmed the trial court's determination that the Act violated the Equal Protection Clause of the Fourteenth Amendment. In doing so, it concurred with the fact finder's evaluation of the testimonal evidence, and it independently evaluated the documentary evidence received at trial.

Petitioner's Statement of the Case contains substantial deviations from the record and from the Minnesota Court's opinion, some of which will be noted in later sections of this brief. As it did in its brief before the Minnesota Supreme Court, Petitioner has attached to its petition as Appendix C one of the 42 trial exhibits. It seeks, by concentrating on this exhibit, to gloss over the great volume of testimonial and documentary evidence produced at trial. The purpose of much of

this evidence was to explain the nature of the information contained in the Midwest Research Institute Report, which was prepared for the U. S. Environmental Protection Agency and concerned the relative environmental impacts of various types of milk containers.[1] This evidence also updated the information in the Report to account for the reduction in weight of the plastic container since the preparation of the Report. Included in the evidence was the testimony of the person from the Midwest Research Institute who was in charge of preparing the Report.

From all of this evidence the trial court found and the Minnesota Supreme Court held that the adverse environmental impacts of the paper container are greater than those of the plastic container. The factual bases for this conclusion are discussed in detail in the opinion of the Minnesota Supreme Court.

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[1] Having commissioned and received the MRI Report, the EPA does not intend to propose any rules or legislation on the subject of milk containers. (Ades deposition (admitted as evidence), p. 18.)

REASONS FOR DENYING THE WRIT

I. THE MINNESOTA SUPREME COURT USED THE CORRECT EQUAL PROTECTION STANDARDS AND APPLIED THEM PROPERLY.

In reaching its decision the Minnesota Supreme Court applied the long-established rational basis standard to the unique facts of this case. Its decision does not expand the frontiers of equal protection. It does not even touch upon the component of equal protection doctrine which has received the most judicial analysis in recent years, i.e., whether a statute will be subjected to a higher level of scrutiny than is required by the rational basis test.

In an effort to attract this Court's attention, Petitioner asserts that the Minnesota Court misapplied or ignored equal protection principles applicable to statutory review. On the contrary, the Minnesota Court adhered to traditional equal protection standards by acknowledging that: (1) the judiciary accords deference to the legislature and may not exercise legislative judgment (A. 5);[2] (2) the legislative branch may undertake reform one step at a time (A. 15); and (3) "the relevant test is whether the classification is rationally related to a legitimate state interest." (A. 4.)

Application of these standards does not, however, immunize a legislative act from judicial scrutiny. On the contrary, their application requires detailed analysis of the facts. Regardless of the nature of the statute, an equal protection challenge requires the reviewing court to consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disad-

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[2] Appendix references are to the Minnesota Supreme Court decision as reproduced in Appendix A to the Petition for Writ of Certiorari.

vantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). *See Illinois State Board of Elections v. Socialist Workers Party*, —— U.S. ——, ——, 99 S.Ct. 983, 990, 59 L.Ed.2d 230, 241 (1979).

Review of these factors by the Minnesota Court was hardly cursory. The Court analyzed in detail the effects of the Act and all of the assertions made by Petitioner in support of the Act in an effort to find a rational nexus between the Act and its purported objectives. It found none. Justice C. Donald Peterson, writing for the Court, observed:

> We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence *conclusively demonstrates* that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives.

(A. 5, emphasis added.)

In its lengthy review of solid waste management issues (the primary thrust of Petitioner's defense), the Minnesota Court discussed generation of leachates and methane gas in landfills, landfill stability and instability, consumption of landfill space, incineration, recycling, and source reduction. It concluded, not that plastic milk containers present greater problems than paper milk cartons, or even similar problems, but that plastic containers "are superior to paper containers

for landfill disposal" and "[t]he evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers." (A. 6, 10.)

The Court also held that there is no factual basis for distinguishing between plastic and paper containers as a means of preventing energy waste or conserving natural resources. Petitioner erroneously asserts that the Court's decision would operate to invalidate any action designed to reduce consumption of oil or natural gas unless such action would result in substantial fuel savings. (Petition, p. 15.) The Court held that the Act "is not reasonably related to the state's interest in preventing energy waste," noting that "production of plastic nonrefillables requires less energy than production of paper containers." (A. 11-12.) It further held that the Act "is not reasonably related to the state's interest in conserving natural resources," because "[i]f any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable." (A. 12.)[3]

In addition to solid waste management and conservation of energy and natural resources, the Minnesota Court considered the other environmental factors analyzed in the Midwest Research Institute Report, including consumption of water and raw materials and generation of water-borne waste and industrial solid waste. It observed that, "when

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[3] Petitioner suggests that any action purportedly intended to decrease consumption of oil or natural gas is "per se reasonable." (Petition, p. 15, n. 12.) Under this theory a legislature could enact, insulated from judicial review, a statute which bans the sale of any item made of plastic that could be made of wood or paper, or any article of clothing made of synthetic fibers that could be made of wool, cotton, or silk. We doubt that Petitioner is really this cavalier about either the depletion of Minnesota's own timber resources or the other obvious economic and environmental ramifications of its suggestion. For example, the chaos created by the conflicting actions of individual states would be intolerable—a factor which highlights the merits of Respondents' argument under the Commerce Clause (see Section III, *infra*).

other environmental factors are considered, *the superiority of plastic nonrefillables is more evident.*" (A. 13, n. 19, emphasis added.)

Petitioner's arguments that the Act was designed to prevent the plastic container (an alleged newcomer to the market) from obtaining a significant foothold in Minnesota and to encourage a return to a system of returnable milk containers were also addressed by the Minnesota Court. It found no evidentiary support for these assertions.[4]

In another effort to attract this Court's attention, Petitioner blatantly mischaracterizes the opinion of the Minnesota Court concerning step-by-step legislative reform. The decision neither holds nor implies "that all undesirable packages be eliminated at once or none may be eliminated." (Petition, p. 13.) The Court held precisely the opposite:

> We do not doubt that legislatures may implement economic programs step-by-step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

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[4] Contrary to the implications in Petitioner's Statement of the Case, the plastic milk container has been widely used in Minnesota for many years. It is only in the Minneapolis-Saint Paul metropolitan area that its extensive use began as late as 1976. Respondents Marigold Foods, Inc., a large Minnesota dairy whose main plant is in Rochester, Minnesota, and Wells Dairy, Inc. began using the plastic container in large quantities in Minnesota in 1973. (R. 421, 449.) Other dairies have used the plastic container in Minnesota for up to ten years. (R. 354.)

The plastic container did not displace returnable containers in Minnesota. The paper carton had already displaced returnables before the plastic container was introduced. (R. 467-468.) Thus consumer preference for the plastic container has not been at the expense of returnables, but of the environmentally inferior paper carton.

The Court continued:

> However, such a step must, at the very least, have a rational relationship to achievement of a legitimate state interest. In the present case, the result of the Act, at best, will not be a step toward amelioration of a perceived evil.

(A. 15-16.) In other words, as indicated throughout the opinion, the Act will not serve to ameliorate solid waste or other environmental problems. It will aggravate such problems by expanding the use of the paper carton and thus more firmly entrenching in the market a container which is environmentally inferior to that banned by the Act. To be valid as a purported step toward resolution of a larger problem, the step must be forward, not backward.[5]

Thus this case is unique, not with respect to governing legal principles, but the factual setting to which the principles were applied. Having failed in both the trial court and Supreme Court to demonstrate a rational basis for the Act, Petitioner now seeks a third judicial analysis of extensive and complex facts. Certiorari is not appropriate for that purpose.

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[5] This is unlike the situation in *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), which sustained an ordinance that was a first step toward eliminating existing problems caused by pushcart vendors in the French Quarter. In barring only those who had operated for less than eight years, the ordinance at least reduced the number of undesirable operations. The problems allegedly addressed by the Minnesota statute, particularly those relating to solid waste, would not be reduced at all, but would be aggravated. Of the two containers in widespread use in Minnesota, the least offensive would be banned, and the most offensive would expand and take over the entire market.

II. THE MINNESOTA DECISION DOES NOT THREATEN THE LEGISLATIVE PROCESS.

By misstating both the holding and reasoning of the Minnesota Court, Petitioner distorts the impact of the decision. The Court did not reject legislative reform on a step-by-step basis. It reiterated the long-established principle that legislation, in the environmental field as in any other, must have at least a rational relationship to a legitimate state interest.

No legislative body at any level of government is unfamiliar with the rational basis requirement. This Court and lower courts have articulated and applied it on innumerable occasions. Whether its application will sustain a particular legislative action always depends upon determined facts — the nature and effect of the classification and the state interests asserted in support of it.

Packaging legislation has been in existence for several years. When it has met constitutional standards, it has been upheld. *Anchor Hocking Glass Corp. v. Barber*, 105 A.2d 271 (Vt., 1954); *American Can Co. v. Oregon Liquor Control Commission*, 517 P.2d 691 (Ore., 1973); *Bowie Inn, Inc. v. Bowie*, 335 A.2d 679 (Md., 1975); *Can Manufacturers, Inc. v. State of Minnesota*, ——N.W.2d——, 13 ERC 1689 (Minn., 1979). *See also United States Brewers Ass'n., Inc. v. Environmental Protection Agency*, 600 F.2d 974 (D.C. Cir., 1979). When rationality has been lacking, it has been invalidated. *The Society of the Plastics Industry, Inc. v. City of New York*, 326 N.Y.S.2d 788, 3 ERC 1370 (N.Y. Sup. Ct., 1971); *Juice Tree of Hawaii, Inc. v. Yuen*, ——P.2d——, 9 ELR 20739 (Hawaii Cir. Ct., 1979). Legislative bodies may look for guidance to a wide variety of existing legislation and a substantial body of judicial analysis. *See Plastic Bans,*

Bottle Bills, and Comprehensive Container Legislation: Packaging Laws Get Mixed Reviews in State Courts, 9 Environmental Law Reporter 10193 (Nov., 1979).

Minnesota need not fear for the vitality of its environmental programs. Its Supreme Court has been vigilant in implementing the state's far-reaching environmental legislation. *See e.g., County of Freeborn v. Bryson*, 210 N.W.2d 290 (Minn., 1973); *County of Freeborn v. Bryson*, 243 N.W.2d 316 (Minn., 1976) (interpreting the Minnesota Environmental Rights Act).

This is also true of packaging legislation. The same day that the instant decision was issued the Minnesota Supreme Court, in an opinion also written by Mr. Justice Peterson, upheld the Minnesota Package Review Act. *Can Manufacturers, Inc. v. State of Minnesota, supra.* This statute, Minn. Stat. § 116F.06, gives the Minnesota Pollution Control Agency extensive powers to regulate the use of new packages and containers.

That it was the Minnesota Supreme Court which invalidated Chapter 268 is therefore particularly indicative of the shortcomings of this purportedly environmental statute. Had the Act been rationally related to legitimate state interests, it would certainly have been upheld. The lack of a rational environmental basis for the Act undoubtedly resulted from the fact that its real purpose was not to protect the environment but to protect the economic interests of certain Minnesota businesses to the exclusion of out-of-state interests. See Section III, *infra.*[6]

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[6] "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (n. 16), 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514, 525 (1975).

Nor does this case threaten the integrity or effectiveness of the legislative process in other jurisdictions. To the extent that this case may deter irrational packaging legislation, it will serve a valuable purpose. Any "chilling effect" (Petition, p. 16) will flow only from a mischaracterization of the decision. The constitutional standards are clear, and they were properly articulated and applied by the Minnesota Supreme Court.

III. FURTHER APPELLATE REVIEW MAY NECESSITATE INVALIDATION OF THE ACT UNDER THE COMMERCE CLAUSE.

The trial court concluded that Chapter 268 also contravenes the Commerce Clause. The Minnesota Supreme Court did not consider the Commerce Clause issue because its equal protection analysis was sufficient to strike down the Act. Should certiorari be granted, this Court may have to rule on the Commerce Clause issue or prolong the appellate process by requiring the Minnesota Court to consider it.[7]

The burdens imposed by the Act on Respondents' activities in interstate commerce are substantial. The statute severely curtails the ability of out-of-state manufacturers of plastic resin and molding machines to market their products in Minnesota. (R. 244, 247, 309.) It undermines the competitive position of Minnesota and out-of-state dairies which sell milk in Minnesota and elsewhere. (R. 346, 427-428, 460.)

Respondents will not undertake an extensive analysis of the Commerce Clause issue. A noteworthy element of the Act,

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[7] The trial court also concluded that the Act violates substantive due process requirements. The Minnesota Supreme Court observed that the rational basis standard is applicable to due process as well as equal protection analysis. (A. 16, n. 20.)

however, is the discerned real purpose behind its passage. The effect of the Act is to exclude plastic milk containers from Minnesota markets to the benefit of the local paper industry; this purpose is inferable from the Act's operation and its illusory environmental benefits. Under these circumstances a reviewing court will consider the purpose and motivation which underlay its enactment to test its validity under Commerce Clause standards. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383, 400 (1977); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 446-447, 98 S.Ct. 787, 797, 54 L.Ed. 2d 664, 678-679 (1978); Note, *Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762, 1772-1773 (1974).

The legislative debates which preceded passage of the Act confirm that its purpose was to insulate the local paper industry from out-of-state plastics competition, the latter being characterized by a sponsor of the bill as "the guys in the alligator shoes from New York and Chicago." (R. 118.) Senator Collin Peterson aptly summarized the situation when he said during floor debate, ". . . this bill is an inter-industry economic struggle. It is not an environmental bill at all." (R. 122.)

Should consideration of the commerce issue become necessary, the Act will not stand. *See, City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Hunt v. Washington State Apple Advertising Commission, supra*; *Raymond Motor Transportation, Inc. v. Rice, supra*; *Hughes v. Oklahoma*, —— U.S. ——, 99 S.Ct. 1727, 60 L.Ed. 2d 250 (1979).

CONCLUSION

This case does not involve a federal question of substance which has not already been determined by this Court. The decision of the Minnesota Supreme Court is in accord with established constitutional principles and applicable decisions of this Court.

The Petition for Writ of Certiorari should be denied.

Dated: February 26, 1980.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court and dissent (A-31)[1] are reported at 289 N.W.2d 79 (Minn. 1979). The order and memorandum of the State District Court (A-16) are unpublished.

JURISDICTION

The Opinion of the Minnesota Supreme Court (A-31) was filed on September 7, 1979. A timely petition for rehearing was denied and judgment entered on October 31, 1979. (A-53, 54) In this case, the Minnesota Supreme Court, the highest state court in Minnesota, held that Minn. Laws 1977, ch. 268, is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A petition for a writ of certiorari was filed on January 29, 1980, and was granted on March 31, 1980. The jurisdiction of this Court rests upon 28 U.S.C.A. § 1257(3) (1968).

QUESTION PRESENTED

Is a state statute banning the use of nonreturnable plastic containers for milk sales, because of their adverse environmental and resource impact, invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it does not also prohibit or compel the elimination of another type of milk packaging which may also have an adverse environmental impact?

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[1] References to the joint Appendix are cited as "A- ".

STATEMENT OF THE CASE

I. The Statute In Question

The 1977 Session of the Minnesota Legislature duly enacted Minn. Laws 1977, ch. 268, codified as Minn. Stat. §§ 116F.21, 116F.22 (sometimes referred to hereinafter as "the Act"). That act provides:

> Section 1. [116F.21] MILK: PLASTIC CONTAINERS: STATEMENT OF POLICY. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in [Minnesota Statutes] section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.
>
> Section 2. [116F.22] PROHIBITIONS. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in [Minnesota Statutes] section 32.391, other than sour cream, cottage cheese and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.
>
> Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.

Section 3. This act is effective July 1, 1977.[2]

II. Procedural History

In this action, commenced on September 29, 1977, the various plaintiffs-respondents (hereinafter "the plaintiffs") challenge the constitutionality of Minn. Laws 1977, ch. 268, codified as Minn. Stat. §§ 116F.21, 116F.22 (1978), which prohibits the sale of milk in certain single-use plastic containers. The plaintiffs fall generally into two categories: those involved in the packaging and sale of milk, and those involved in the production and sale of plastic goods and associated equipment. The first group includes: Clover Leaf Creamery Company ("Clover Leaf"), a Minnesota dairy; Marigold Foods, Inc. ("Marigold"), a Minnesota dairy; Wells Dairy, Inc. ("Wells"), an Iowa dairy; and Weber & Barlow Stores, Inc. ("Barlow"), a grocery retailer. The second group includes: the Society of the Plastics Industry, Inc. ("SPI"), the principal trade association of the plastics industry; Phillips Petroleum Company ("Phillips"), a multi-national petrochemical company; Hoover Universal, Inc. ("Hoover"), a maker of molding equipment; and M-H Packaging Systems, Inc. ("M-H"), a molder of plastic containers.

On November 29, 1977, the State of Minnesota (hereinafter the State) moved for an order dismissing the plaintiffs' complaint. (A-10) Seven dairy companies[3] filed a brief in

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[2] Minn. Laws 1977, ch. 455, § 96, provided:

Sec. 96. Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, nonrefillable plastic containers shall be effective prior to July 1, 1978. This section is effective the day following final enactment.

Thus, the Act was to have taken effect July 1, 1978.

[3] Ewald Dairy, Meyers Bros. Dairy, Oak Grove Dairy, Polka Dot Dairy, Purity Dairy, Sanitary Dairy, and Schroeder Dairy Co., Inc. *See* Brief of Amicus Curiae in support of Motion to Dismiss.

support of the State's motion. On December 20, 1977, the State's motion was denied. (A-11) Trial was held in Ramsey County District Court commencing on March 15, 1978, and concluding March 21, 1978. On April 5, 1978, the District Court issued its order holding that the Act is unconstitutional and unenforceable upon various grounds asserted by plaintiffs. (A-16) Judgment was entered in accordance with that order on April 7, 1978. (A-28)

The State appealed to the Minnesota Supreme Court, which, on September 7, 1979, affirmed the District Court ruling, holding that the Act denies equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. (A-31) The State's petition for rehearing was denied on October 31, 1979, (A-52) and judgment was entered. (A-53) The State petitioned this Court for certiorari, which was granted on March 31, 1980.

III. Background: The State Of The Market

In general, milk containers can be broken into three categories: (1) returnable containers, made of glass or plastic; (2) non-returnable, or throwaway, containers, made of plastic or paperboard; and (3) the plastic "pouch" container, a flexible plastic bag which is typically inserted in a rigid reusable pitcher. The returnable containers, because they can be used as many as 50, 100, or even 150 times, have relatively small environmental and resource impacts per gallon of milk delivered. Similarly, the pouch, while it is not reusable, has a relatively limited effect on resource depletion, waste disposal and other environmental concerns. The two types of containers with by far the most adverse impact are the throwaway plastic and the throwaway paper containers.

For most of this century, the returnable glass bottle was the predominant container for the sale of milk, both in Minnesota and nationally. (T. 355)[4] Since the early 1960's, the paper carton has predominated, and has held approximately 60 to 70 percent of the market. (T. 76) In the 1960's, the non-returnable plastic container (hereinafter sometimes referred to as the "plastic container" or "plastic jug") began to appear in the gallon size. In 1966, plastic containers still accounted for less than one percent of milk containers nationally. (T. 618) Since that time, however, sales of plastic containers have grown at a remarkable rate, primarily at the expense of glass returnable bottles. (T. 76, 77) By the time of trial in 1978, plastic held approximately 30 percent of the national market and, at the national level, glass bottles had been virtually eliminated. (T. 77) If unchecked, the throwaway plastic container was projected to occupy more than half the national market within ten years. (T. 77)

The phenomenal growth of the throwaway plastic container is the result of its consumer convenience features, which make it virtually unstoppable once it gains a foothold in a market. Plaintiffs' witnesses testified that they had "never seen anything take over like this . . .," (T. 413) and that the throwaway plastic jugs have "preempted the market." (T. 426) The gallon paper carton simply can't compete with the plastic jug. (T. 346) Because the gallon paper carton leaks, is awkward to handle and seal, and is susceptible to odors and spoilage, it was described as "probably the most cumbersome and least well thought of package in the entire industry." (T. 450) One witness for plaintiffs testified that when another dairy introduced the plastic container into a Nebraska market where he was selling paper cartons, "[w]e quickly found that either

[4] "T. " refers to the transcript of the trial in the Minnesota District Court.

we were going to have a plastic package to compete with it or we were not going to be in business." (T. 423)

The situation in Minnesota in 1976 and 1977 was different, however. Minnesota was one of the last areas in the country where the one-way plastic container was introduced. (T. 295, 459) Prior to 1977, the plastic container was still a relative newcomer. While, by that time, a number of dairies outside the Minneapolis-St. Paul metropolitan area were marketing the throwaway plastic container (T. 354, 421, 449), only one Minnesota dairy, plaintiff Marigold, was actually producing this container. (T. 459) A number of dairies continued to market the traditional, environmentally preferable, returnable container, some in glass, others in plastic.[5]

In 1976, a major structural change in the Minnesota market appeared to be imminent. In that year, many Minnesota dairies began taking steps toward the in-house production of plastic containers for the sale of milk. (T. 628) By late 1976, at least 6 dairies had placed orders for heavy blow-molding machinery to be used in the production of such containers, at an average cost of $220,000 per machine. (T. 254, 259-263; Defendant's Exhibit 1) These machines, all of which are made by plaintiff Hoover Universal, Inc. (T. 244), have a useful life of at least 13 years. (T. 259)[6]

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[5] Plaintiffs' witness Dwight Holcombe testified that Hastings Cooperative, Schroeder Milk Company and Oak Grove Dairy sell milk in returnable plastic bottles. (T. 355, 353) Plaintiffs' witness David Ramsey testified that Danheim Dairy uses returnable glass bottles. (T. 466, 467) The State's expert witness, Harold Samtur, testified that Schroeder Dairy uses returnable containers. (T. 562, 563) Further, Samtur was not permitted to identify other dairies using returnables, on the ground that his testimony, based on conversations with representatives of various dairies and the Minnesota Department of Agriculture, was hearsay. The State made an offer of proof that, if permitted to testify, Samtur would state that returnables were also used by Land O' Lakes Dairy in Duluth, by Polka Dot Dairy and by Superior Dairies. (T. 559-563)

[6] Plaintiffs' witness Samuel Rupert, of Hoover Universal, Inc., testified that every machine sold in 1964 was still in operation at the time of trial in 1978, so that he was not sure what the predicted life of the machines is. (T. 259)

Before these purchases were consummated, however, it became apparent that the Minnesota legislature was contemplating a prohibition of the throwaway plastic container, and all but one of the dairies were able to cancel their orders. (T. 259) The single dairy to take delivery of blow-molding machinery was able to reach a buy-back agreement, under which the manufacturer agreed to repurchase the machinery, charging the dairy only a less-than-normal fee for use of the equipment. (Plaintiffs' Exhibit R, T. 250, 251, 263, 264) In addition, plaintiff M-H Packaging purchased a blow-molding machine in the fall of 1976 for the manufacture of plastic containers for milk, juice and water. (T. 283-285, 293, 294)

IV. Background: Enactment Of The Statute

In early 1977, with major dairies on the verge of great financial commitment to the throwaway plastic container, the Minnesota legislature acted to ban its use. The introductory remarks of Senator William Luther, the bill's chief sponsor in the Minnesota Senate, (T. 121), upon the opening of the Senate floor debates, are set out here in full to convey the breadth of the concerns underlying the legislature's action.[7] Senator Luther stated:

> Mr. President, members of the Senate, H.F. 45 is the bill which would prohibit the sale of milk in plastic throwaway containers as of July 1, 1978. I will try to be very brief in my remarks because I know all of us are very anxious to get out for dinner and because we have alot of

[7] A transcription of the full floor debates in both houses of the Minnesota legislature was offered and admitted into evidence as Plaintiffs' Exhibit J. (T. 112, 113) Unless indicated, the spelling and punctuation employed in quotations from the debates corresponds to that of Plaintiffs' Exhibit J.

work to do later this evening. The bill is basically in response to the fact that we in Minnesota are on the verge of a massive market change over to the throwaway plastic container. The bill has a great deal of support. It has been passed by the House just recently and it has the support of the Pollution Control Agency, the Department of Agriculture, the Department of Natural Resources and Consumer Services Division as well as the Minnesota Energy Agency. The City of Minneapolis has passed an ordinance which bans the sale of these kinds of plastic throwaway containers in the City of Minneapolis and their intent in doing that was to give those of us here in the legislature the opportunity to make this decision on this particular issue before the plastic throwaway takes over the market in Minnesota. That ban enacted by the City of Minneapolis does end on June 1, 1977, only a few days from now. There is also a great of support for this legislature among the general public and a recent Minnesota poll -66% of the responses said the plastic throwaway is undesirable. First, before making any further comments, I want to point out that clearly the most preferable container system would be a returnable container system for milk delivery. A returnable milk delivery system based on a 50 trip returnable and based on 60,000,000 gallons of milk sold in gallon containers each year in Minnesota, would use 372 billion BTU's less petroleum and natural gas energy in a year than the throwaway plastic system which is being proposed by the opponents of this bill. That is enough energy in Minnesota, members of the Senate, to heat 3,100 homes for one year. In landfill space the throwaway plastic system requires 32 times the landfill space that a refillable plastic system does. A conver-

sion to the non-refillable plastic system at the present time normally requires a major capital investment on the part of the dairies. This creates a hardship on the small dairies of our state. That capitol investment has been estimated to be in the area of 300-400 thousand dollars and it would be extremely difficult for us to switch back to a refillable system which is, of course, the preferable system once that conversion to the throwaway plastic container is made. Secondly, there are very solid environmental, economic and consumer reasons to support the continued use of our paperboard system in Minnesota. I point out again as I said before that the move to the plastic would most likely preclude our future options to go into a returnable system. We all know that by the mid 80's we are going to run out of landfill space here in the metropolitan area, plastic is made of polyethylene which is a product of natural gas and petroleum, two our fuel resources which are in the shortest supply and while paperboard is made from trees, plastic is also non-biodegradable. Just to give you a couple figures, in a draft report prepared for the EPA by Midwest Research Institute, or MRI, it was found that the throwaway plastic uses a net of 2.88 million BTU's more petroleum and natural gas for every 1,000 gallons of milk than does the paperboard system. So based on 1,000 gallons of milk and in Minnesota we have 60,000,000 gallons of milk annually in gallon containers, this would mean that we could heat, just on the savings from staying with the paperboard containers rather than going with the plastic throwaway, we could heat 1,400 homes per year. Furthermore, the availability of natural gas and petroleum is declining and the price is going up, so from the standpoint of available

> reserves, and consumer prices, it is clear that going to our short supplies of natural gas and petroleum is not the way to go. Finally, I would just say that the opponents of this legislation will have many arguments to present to you, but I want to just leave you with this particular thought, and that is when the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. It makes absolutely no sense for us to standby and permit this delivery system to go into another non-returnable system. *There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.* You all were here when we argued out the S.F. 1 dealing with the mandatory deposit bill and you heard the arguments and so you know how difficult it is to make that change once we permit that system to take over the market. It is clear from the evidence that I have seen that the throwaway plastic container will take over the market unless we act on this bill here this evening.

Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 1, 2 (emphasis supplied).

The bill was supported by the Minnesota Department of Energy, the Minnesota Pollution Control Agency, the Minnesota Department of Natural Resources, the Minnesota Department of Agriculture, and the Consumer Services Division of the Minnesota Department of Commerce. (T. 142) Although the bill was approved on May 26, 1977, it has never been im-

plemented. Prior to the Act's effective date,[8] this action was commenced, and enforcement of the Act was enjoined.

V. Purposes Of The Act: Non-Proliferation Of Throwaways

At trial, evidence was offered concerning several of the purposes of the Act. The testimony of 15 witnesses (two of whom testified by deposition) and voluminous documentary evidence were admitted. Some of this evidence concerned the expressed legislative purpose of prohibiting the throwaway plastic container before it could become irreversibly dominant in the market and before there developed such economic reliance upon the plastic container—in the form of capital investment and employment—that eradication of this admittedly-bad container would entail great social and economic dislocation. This concern was expressed repeatedly during the legislative debates.

The bill's chief sponsor in the House of Representatives, Representative Willard Munger, argued that ". . . we need this legislation to stop the rapid change over in the dairy industry to plastic throwaways before it becomes a problem in the State of Minnesota,"[9] and warned that the bill was needed ". . . so that the plastic industry isn't going to get a strangle hold in Minnesota. . . ."[10] He explained:

> I think it is time to act on this legislation now. Minnesota's dairy market is on the verge of making a major change over from essentially a paperboard container sys-

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[8] As adopted, the Act was to take effect July 1, 1977. Minn. Laws 1977, ch. 268, § 3. The effective date was delayed to July 1, 1978, by Minn. Laws 1977, ch. 455, § 96.

[9] Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 10, 1977, at 1.

[10] Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 17, 1977, at 6.

> tem to a system of primarily single use, throwaway plastic bottles. The major dairies in our state have ordered the blow-mold equipment to manufacture in plant the non-returnable plastic milk bottle. Members of the House, I feel now is an ideal time for this legislation when only one dairy in our state is firmly established in manufacturing and marketing the throwaway plastic milk bottle.

Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 10, 1977, at 2.

Similar concerns were expressed in the Minnesota Senate, where Senator Allan Spear argued:

> This bill regardless of the particular merits of plastic milk bottles over paperboard milk bottles, this bill is designed to prevent the beginning of another system of non-returnables that is going to be very, very difficult once it begins. It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another non-returnable system with all the investment and all of the vested interest that that is going to involve to begin. . . .

Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 6.

One element of this concern was a recognition that once dairies were permitted to invest millions of dollars in machinery for the manufacture of plastic containers, and once jobs were created for their manufacture, it would become much more difficult to remove them from the marketplace. Senator John Milton urged:

> Here is an opportunity for us to stop something before it gets started. To stop something before everyone has to get this filling equipment. A year from now, two years from now, 5 years from now, 10 years from now they all come back and say, now if you guys had taken care of it then, that was the time to do it, but now we have got a 1,000 jobs in the state of Minnesota and now you can't do it, now you can't use those resources because it is going to cost jobs. The only way to go about these kinds of things is to take preventive medicine. . . .

Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 6. Other legislators echoed this desire to address the problem while it was still "on the horizon."[11] Thus, the legislature viewed the impending move to in-house manufacture of throwaway plastic containers as likely to create a substantial barrier to any voluntary or mandated switch to returnables.

Plaintiffs' two principal expert witnesses conceded that their study of milk containers did not take into account the economic and social impacts of allowing or prohibiting particular containers, (T. 208, 209, Deposition of William Ades,[12] 31), even though they agreed that, in formulating container legislation, lawmakers should consider the effect of the legislation upon employment and capital investments, and the costs of redirecting capital investment. (T. 20, Ades Depo., 31) Witnesses for plaintiffs also indicated that, had the leg-

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[11] Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 9, (remarks of Senator Schaaf). See also, remarks of Senators Luther, *Id.*, at 1, 2; and Perpich, *Id.*, at 10; and Representative Munger, *Id.*, House of Representatives, Floor Debates, March 14, 1977, at 1, 12, and March 17, 1977, at 4.

[12] This deposition and the exhibits thereto were admitted into evidence. (T. 274-279) This deposition is cited hereafter as "Ades Depo."

islature instead chosen to ban both the throwaway plastic container and the predominant paper carton, the economic disruption would have been far greater (T. 443), and dairies would have found themselves, at least temporarily, with no readily available package for their milk. (T. 474)

VI. Purposes Of The Act: Energy Conservation

A second concern of the legislature in adopting the Act was the conservation of nonrenewable fossil fuels. The polyethylene from which plastic milk containers are made is refined from either crude oil or natural gas. (T. 305, 306) At the present time, approximately 70 percent of this plastic is derived from natural gas. (T. 313)

Concern for the consumption of finite resources was prominent in the minds of the legislators in adopting this Act. The bill's chief sponsor in the House of Representatives stated:

> . . . A sweep to the plastic throwaway bottle in the gallon size container alone would use enough additional natural gas and petroleum to heat 3,100 homes each year in Minnesota when compared to a refillable system and 1,400 compared to the present paperboard system. Plastic containers are made from a non-renewable resource while the paperboard is made from Minnesota's forest products. The renewable natural resources are important to the forest industry and the economy of our state. . . . Plastic will increase energy consumption. This legislation will conserve a non-renewable natural resource, fossil fuels. It will use and help promote Minnesota's natural resources, wood fiber. It will help protect our environment. . . . The polyethylene used to make plastic milk containers is a derivitive of our fossil fuels which must

> be conserved for energy use. For every 1,000 gallons of milk packaged in plastic containers, 165 pounds of polyethylene is used compared to 20 pounds of polyethylene for the same amount of milk packaged in paperboard and I think that is very important. There is a ratio there of energy use. Nation wide in 1973 Americans threw away 140 million tons of solid waste. We spent 4-1/2 billion just to throwaway the throwaways. Our country can no longer afford this waste of our natural resources and we must change our sense of direction and I think this bill changes that sense of direction. . . .

Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 10, 1977, at 2.

Similarly, the chief Senate sponsor argued that "[w]e have been through an energy crisis in Minnesota. We know what it is like to go without and what we are looking at here is a total blatant waste of petroleum and natural gas . . ." Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 12, (remarks of Senator Luther).

Senator David Schaaf reiterated this concern:

> . . . I don't know how many of the rural members have plastic trees in their backyard. But the petroleum products and the natural gas used in these things is an exhaustible resource. It is not a renewable resource. I think what we are saying here is that this is on the horizon; here and now is our chance to say look we are throwing those lighters, we are throwing away razors, we are throwing away everything in the world, all of our resources. Lets get this one before the economics of the packaging get so far out of hand that we won't be able to deal with this like we can't deal with ban-the-can.

Id. at 9.

Evidence at trial showed that the production of a single 65 gram one-gallon plastic container consumes roughly 3.39 cubic feet of natural gas for raw materials alone,[13] and that this natural gas could instead be used for many other purposes (T. 308, 317), including heating fuel. (T. 203, 313) Natural gas and oil exist in finite amounts and are non-renewable resources. (Ades Depo. at 43-44) It is not contested that in recent years the unavailability of sufficient supplies of oil and natural gas to meet heating and energy needs has caused great hardship in the United States.

In contrast, paperboard containers are produced primarily from wood pulp with only a thin coating of polyethylene, which comprises 10 percent, or slightly less, of the container by weight. (T. 40) There is no evidence that hardship has resulted or may be expected due to depletion of wood pulp resources, which, of course, are renewable.

Substantial evidence was also introduced concerning the separate question whether, regardless of the sources of the energy involved, fewer overall BTU's are consumed in producing one type of container than another. All parties relied upon a study prepared by the Midwest Research Institute for the United States Environmental Protection Agency. The report, entitled "Resource and Environmental Profile Analysis of Five Milk Container Systems," (hereinafter "MRI Report"), and admitted into evidence as Plaintiffs' Exhibit I, (T. 80) attempts to quantify some of the respective environmental effects of various types of milk containers. The findings of the MRI Report with respect to gallon containers are summarized in the following table:[14]

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[13] Plaintiffs' Exhibit M (T. 165-166) indicates that the raw materials (i.e., fossil fuels) account for 3,490,000 BTU's per 1,000 65 gm containers or 3,490 BTU's per container. Natural gas produces 1,030 BTU's per cubic foot in combustion. (Plaintiffs' Exhibit I, at 105, T. 80)

[14] The asserted interest of plaintiffs, and the focus of trial evidence, related to the gallon size container. Unless otherwise qualified, reference in this brief to a particular milk container is intended to refer to the gallon size.

TABLE 2

SUMMARY IMPACT DATA FOR 1,000 GALLONS OF MILK DELIVERED
(in one gallon containers by type of container system)

Impact category	Units	Milk Container Systems										
		Refillable Containers							Nonrefillable Containers			
		Glass Bottle			Plastic Bottle				Plastic Bottle	Paperboard Carton[a/]	Paperboard Carton[b/]	Plastic Pouch
		5-Trip	10-Trip	20-Trip	5-Trip	10-Trip	20-Trip	50-Trip	1-Trip	1-Trip	1-Trip	1-Trip
Raw materials[c/]	lb	954.15	480.03	242.97	21.88	14.83	11.31	9.20	17.70	238.88	238.88	2.34
Energy	10^6 Btu	7.42	4.41	2.90	4.98	3.08	2.13	1.56	8.78	6.20	8.62	3.59
Water	10^3 gal.	1.29	0.86	0.64	0.69	0.55	0.48	0.44	0.66	2.87	2.87	0.32
Industrial solid waste	cu ft	2.12	1.10	0.60	0.27	0.18	0.14	0.11	0.38	0.85	0.85	0.13
Atmospheric emissions	lb	32.67	20.93	15.07	19.80	13.70	10.67	8.81	30.86	26.08	26.08	14.02
Waterborne waste	lb	6.26	4.76	4.01	4.08	3.61	3.38	3.32	3.13	6.24	6.24	1.51
Postconsumer solid waste	cu ft	19.92	10.02	5.02	16.24	8.46	5.06	2.00	75.43	30.39	30.39	1.05

Source: Midwest Research Institute.

a/ Total energy without including energy derived from burning wood wastes.

b/ Total energy after including 2.42×10^6 Btu of energy derived from burning wood wastes.

c/ Hydrocarbon feedstocks are counted as energy rather than pounds of raw materials. Wood fiber, sand, etc., are counted as pounds of raw materials.

Plaintiffs' Exhibit I, at 8.

As this table shows, the MRI Report ranked the throwaway plastic container as the worst energy consumer among containers. This difference is even more pronounced if, in calculating the energy consumed in making paper cartons, credit is given for the energy recaptured by burning the wood wastes generated in making the cartons.

Plaintiffs offered testimony for the purpose of persuading the court to make several adjustments to these MRI figures. First, there was testimony to the effect that typical plastic containers are about 5 grams lighter than the 72.3 gram sample[15] used for the MRI study. (T. 66, Plaintiffs' Exhibit I, at 7) However, representative containers offered into evidence by plaintiffs weighed from 69.5 to 75.7 grams. (T. 341, 432-434)[16] Second, plaintiffs offered the testimony of MRI investigator Richard Welch that the "most appropriate" energy figures are those which deny credit for energy recaptured by burning wood wastes in the manufacture of paper cartons (T. 161-163), even though the MRI Report made no recommendation as to the treatment of this wood waste energy, and expressly left that choice to governmental decisionmakers.[17]

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[15] All weights stated include both the disposable plastic container and its disposable plastic cap or closure.

[16] In addition, a survey by the paper industry found that the 72.3 gram container and cap used for the MRI study was actually *lighter* than the average plastic containers in use (T. 231), and one of plaintiffs' witnesses testified that containers lighter than 70 grams sometimes leak. (T. 435, 436)

[17] Although this wood waste energy is, in fact, actually recaptured, and although the energy thus saved has no readily available alternative use as fuel, Welch contended that this recapture should not be credited because of the difficulty in obtaining comparable data on the use of "waste" gases, which he said were used to "power various processes" in the petroleum industry. (T. 162, 163) These petroleum "wastes" are primarily derivatives of natural gas, which could readily be used as fuel. (T. 202, 203) There was no evidence that wood wastes burned for energy in making cartons would be put to alternative uses if they were not burned.

(Plaintiffs' Exhibit I, at 4) Third, plaintiffs offered alternative energy calculations using different treatments of the energy value of raw materials.[18] If the MRI Report were redone along the lines plaintiffs' evidence proposed, then plastic containers would be found to consume somewhat less total energy than paper cartons.

Data compiled by a task force of the Ministry of the Environment of the Province of Ontario, Canada, also found the throwaway plastic container to be the greatest consumer of energy. The following table, reprinted from the Deposition of Giles Endicott, Exhibit 3, at 206 (Endicott Depo. 14),[19] shows the findings of the task force, using comparative ratios in which the impacts of returnable plastic bottles are set at 1, and using an 80-gram throwaway plastic bottle:

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[18] In calculating energy consumption, the MRI study included as energy the energy value of the natural gas and petroleum feedstocks used for the raw materials of the plastic container, but did not include the energy value of the wood pulp from which the paper carton is made. This approach reflected MRI's calculated judgment that petroleum and natural gas are nonrenewable, and that "energy is a more critical application of the petroleum and natural gas." (T. 161) One of the alternative calculations prepared by Welch excluded the energy value of fossil fuel feedstocks from the calculation for plastic jugs; the other alternative calculation included as energy the energy equivalent value of the wood pulp used in the paper carton. Both of these calculations denied credit for wood waste energy recaptured in making paper cartons. (Plaintiffs' Exhibit M)

[19] The Endicott deposition, with the exhibits thereto, was admitted into evidence at trial. (T. 375, 479, 480)

Estimated Solid Waste and Energy Requirements for Milk Containers by Size and Type for 3,000 Quarts of Milk Delivered

Table III.11.2

Consideration Area I

Container Size and Type	Estimated Solid Waste Generated for 3,000 Qts. of Milk Delivered: Weight (lbs.) (1)	Comparison Ratios Based on 3 Quart R.P.J. (2)	Rank	Volume (cu. ft.) (3)	Comparison Ratios Based on 3 Quart R.P.J. (4)	Rank	Container Energy Input for 3,000 Qts. of Milk Delivered (Million BTU's) (5)	Comparison Ratios Based on 3 Quart R.P.J. (6)	Rank
CATEGORY A: 3 Quart Size									
1. Paper Carton	365.00	55.2:1	5	17.05	51.7:1	4	2.19	10.9:1	4
2. Refillable Glass Bottle (2 Qt.)	172.95	36.0:1	3	2.46	7.5:1	3	2.13	10.6:1	3
3. Plastic Pouch	64.00	13.3:1	2	1.10	3.3:1	2	0.57	2.8:1	2
4. Refillable Plastic Jug	4.80	1.0:1	1	0.33	1.0:1	1	0.20	1.0:1	1
5. Non-refillable Plastic Jug	176.00	36.7:1	4	62.93	190.7:1	5	3.75	18.8:1	5

SOURCE: Solid Waste Generation Model, Part VI, Section 2, and Energy Model, Part VI, Section 3.

(*See* also Endicott Depo. 35, 36, 76. Endicott Depo. Exh. 13, at 251)

Aside from the question whether plastic containers consume more total BTU's, plaintiffs' witnesses,Welch and Ades, agreed that the renewability or nonrenewability of the resources consumed should be considered in packaging decisions. (T. 208, 209, 211, Ades Depo., 31) These witnesses conceded that, apart from the treatment of raw material energy values, the raw BTU figures calculated in the MRI Report do not attempt to take into account the nonrenewability of fossil fuel energy, or to give it any greater weight than energy from renewable sources. (T. 208, 209, 211, Ades Depo., 31, 43, 47)

VII. Purposes Of The Act: Solid Waste Disposal

A further concern expressed by Minnesota legislators prior to adoption of the Act involved the solid waste problems caused by throwaway packaging, particularly the landfill space which would be consumed by throwaway plastic jugs.[20] About ninety percent of post-consumer solid wastes are disposed of in landfills. (T. 67) The volume of waste materials is a key factor in solid waste management, (T. 495) and is the limiting factor in determining the life of most landfill operations. (T. 401, see also T. 228) Both the MRI Report and the Ontario study found that plastic throwaways would create a greater volume of solid waste than any other container studied. The initial draft version of the MRI Report had simply assumed that the paper and plastic containers would consume equal space in landfills. Subsequently, however, a study was performed by the Weyerhauser Company. (T. 63,

[20] *See e.g.*, Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 14, 1977, at 13, 14 (remarks of Rep. Forsythe); Full Senate Floor Discussion, May 20, 1977, at 1, 2 (remarks of Sen. Luther).

64, Plaintiffs' Exhibit O, T. 179) The Weyerhauser investigators had attempted to simulate the materials in a landfill (T. 176) and had used a testing device to measure the amount of pressure necessary to crush the two types of containers, the amount of pressure necessary to hold the containers in a crushed condition, and the tendency of the containers to spring back to their original shape and volume. They had also placed a 6-inch layer of dirt on the two types of containers and had found that the dirt was sufficient to hold the paper carton in its crushed state, but that the dirt would not hold the plastic container. (T. 176, 177) Based upon the Weyerhauser Report as the best available data, the final MRI Report was modified to show the plastic container taking more than twice the landfill space of paper. (Ades Depo., 14)

The State's expert witness, Harold Samtur, testified that milk cartons may occupy as much as 5 or 6 percent of the solid waste stream, by volume, depending upon the assumptions used (T. 616), and that milk containers are one of the largest single categories of packaging waste. (T. 553) Samtur testified that, on the basis of the Ontario study, the MRI Report, his personal experience with landfills, discussions with colleagues and a study on compactibility of different packaging materials, it was his expert opinion that plastic would consume significantly more space than paper, and that, while landfill disposal would reduce a paper carton to 10 percent or less of its original volume, a plastic jug would retain from 25 to 40 percent of its original volume. (T. 605, 606) It was therefore Samtur's expert opinion that banning the throwaway plastic milk container would reduce the volume of solid waste generated in Minnesota. (T. 557, 558)[21]

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[21] It was Samtur's further conclusion that if, by 1985, Minnesota were to convert to the use of refillable containers and plastic pouches, the volume of milk containers in the solid waste stream would be reduced by 96 percent. (T. 556)

Plaintiffs attacked this conclusion, but offered no documentation or study to support their own contention that plastic containers and paper cartons occupy equal space in landfills.[22] Instead, they attempted to discredit each of the studies and opinions supporting the ban on plastic.[23] Plaintiffs' witnesses Welch and Ades knew of no other compaction studies (Ades Depo., 14; T. 174) and acknowledged that the MRI figures were based upon the only documentation available, (T. 174) but they expressed less than complete confidence in the MRI/Weyerhauser figures, since they did not feel the study adequately simulated landfill conditions. (T. 174, Ades Depo., 15) Welch professed no expert knowledge of solid waste disposal,[24] but felt that it would have been very desirable to have had other compaction studies (T. 172-178), and Ades testified that the lack of an empirical data base made him less confident of the MRI waste volume figures than of MRI figures in other areas. (Ades Depo., 15) Ades was at least equally uncomfortable, however, with the notion that the two containers would occupy equal space. (Ades Depo. 32)

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[22] Plaintiffs did offer a courtroom demonstration in which one plastic and one paper container were carefully hand-folded as evidence of the spring-back tendencies of the two containers. Substantial evidence was also introduced by plaintiffs concerning landfill processes of crushing and covering and landfill problems relating to leachates and gases produced from decomposition.

[23] For example, plaintiffs dismiss what was called the "Eggshell Report" (See T. 512-517, 606, 607), a portion of which was admitted into evidence as Defendant's Exhibit 10 (T. 508, 516), because the study's findings as to the disposability of polyethylene containers did not focus specifically on polyethylene *milk* containers. They dismiss the findings of the Ontario study (Endicott Depo. Exh. 3) because they contend the 80-gram milk bottle considered there was too heavy. They attacked the MRI figures because the compaction study from which they were derived did not identify the weight of the containers used, and because they did not believe the study adequately approximated landfill conditions. (T. 173, 179)

[24] Welch testified: "I am not an expert so I don't know that much about landfills." (T. 214, see also T. 229) Welch also disavowed any expertise with regard to recycling (T. 204) or post-consumer waste disposal generally. (T. 229)

Whatever its degree of confidence, MRI determined that Weyerhauser figures were the best available data, and these figures were used in the MRI Report and accepted by the EPA. Ades testified that, if a lawmaker were concerned primarily with the two problems of solid waste volume and energy consumption, the MRI Report could support a decision to distinguish between plastic and paper milk containers. (Ades Depo., 35)

SUMMARY OF ARGUMENT

The State of Minnesota asserts that the Minnesota Supreme Court in declaring the Act violative of federal equal protection guarantees has attempted to assume the role of "super legislature" wisely abandoned by this Court decades ago. For many years this Court has admonished that the essential judicial power to invalidate legislation which plainly contravenes specific constitutional proscriptions must not be taken as license to assume the legislative function of judging the wisdom, expediency, or effectiveness of legislation. Nowhere has this principle been more strongly asserted than in areas of business and economic regulations neither involving invidious discrimination nor affecting basic civil rights. Such legislation must not be declared unconstitutional if there is any rational basis to think that some public interest may better be served by adopting the Act than by not adopting it. In this case, a number of legislative judgments, all consistent with logic, public policy, and evidence at trial, support the decision to ban throwaway plastic containers as part of broader efforts to address the problems of resource consumption and waste disposal associated with throwaway packaging.

Regardless of whether the throwaway plastic container is worse, environmentally, than the paper carton, it is clear that

both of these containers are much worse than the other available alternatives, returnables and plastic pouches. It is equally clear that the plastic container is a relative newcomer to the Minnesota market, and that, at the time the law was enacted, many major dairies were on the verge of purchasing expensive machinery to manufacture disposable plastic containers, but had not yet done so. The economic and social consequences of eliminating the plastic container in 1977 were much less severe than would have resulted from elimination of both the plastic and paper containers, which would have required near total conversion of all milk packaging at once. In addition, entrenchment and expansion of the plastic container would severely impair future movement toward greater use of returnable bottles and plastic pouches, both because of capital commitments and because of the overpowering consumer appeal of the plastic container.

Further, there is reason to believe the plastic container is worse, environmentally, than even the paper carton. Plastic containers consume more energy than other containers. Moreover, they are manufactured of material derived from scarce fossil fuels. Finally, there is evidence that plastic containers consume substantially more space in landfills than do paper containers. Thus, there exist reasonable bases for a legislative judgment that, from solid waste and fossil fuel perspectives, the plastic container is less desirable than the paper one. More importantly, however, there exist sound reasons for the Minnesota legislature to have acted first to stop economic entrenchment of the plastic container, even if the plastic and paper containers are both viewed as undesirable.

Plaintiffs and the Minnesota Court insist that both the plastic and paper containers be prohibited at once. It is, in the State's view, vitally important that legislatures be allowed the

discretion to begin with less restrictive measures to advance a public purpose rather than being compelled, under the guise of constitutional mandate, to take an all-or-nothing approach.[25]

ARGUMENT

I. EQUAL PROTECTION REVIEW OF ECONOMIC REGULATIONS IS EXTREMELY LIMITED.

The majority opinion of the Minnesota Supreme Court, declaring the Act invalid on federal equal protection grounds, reflects a total misconception of the appropriate standards of review, as set forth by this Court in numerous cases.

In undertaking such a review, a court exercises a very limited function. The question before the court is not whether the evidence of record preponderates in favor of, or against, the passage of a legislative enactment. Rather, the sole question for the reviewing court is whether, on searching the record and its own mind, the court can reasonably conceive of any facts which would justify the classifications made by the stat-

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[25] Plaintiffs have suggested that they may also assert in this Court commerce clause objections to the Act—an issue not decided by the Minnesota court. The State will respond, in its reply brief, to any commerce clause arguments which may be raised by plaintiffs. Although the Minnesota court did not reach the commerce clause issue in the instant case, however, it is worthy of note that in the case of *Can Manufacturers Institute, Inc. v. State of Minnesota*, 289 N.W.2d 416 (Minn. 1979), decided the same day as the instant case, the Minnesota Supreme Court upheld general packaging review legislation against commerce clause attack, holding that:

> [P]laintiffs' Commerce Clause attack would be persuasive only if it were clear on the record that the state's interests in reviewing packages as an element of its solid waste management program are illusory.

Id. at .

Thus, it is plain that, as indicated by Justice Wahl in dissent, correction of the Minnesota Court's erroneous determination of the Equal Protection issue is dispositive of any commerce clause claim.

ute.[26] If such facts are conceivable, the court's inquiry is complete: the statute must be sustained.

Thus, the regulation of wholly economic matters merits "only the mildest review under the Fourteenth Amendment."[27]

This observation is underscored by the fact that only once in the last half century has this Court overturned an economic regulation as violative of equal protection and even that aberation has since been overruled as erroneous.[28] As the now-unbroken line of this Court's decisions demonstrates, the burden of proof which must be sustained by a challenger is exacting indeed.

To sustain that burden, and to prevail in their assault upon the Act before the court, the plaintiffs must prove that the Act has absolutely no conceivable "basis in practical experience",[29] and that it cannot possibly reflect any "reasonable distinction, or difference in state policy."[30] That is, they must

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[26] McDonald v. Board of Election Commissioners, 394 U.S. 802, 808, 809 (1969); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); McGowan v. Maryland, 366, U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[27] Craig v. Boren, 429 U.S. 190, 207 (1976).

[28] Morey v. Doud, 354 U.S. 457 (1957), overruled, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[29] McGinnis v. Royster, 410 U.S. 263, 276 (1973), quoting South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966). *See also* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955); Railway Express Agency v. People of State of New York, 336 U.S. 106 (1949).

[30] Allied Stores of Ohio, Inc. v. Bowers, *supra,* 358 U.S. at 528. The statute, of course, need not be drawn with " 'mathematical nicety' ", Dandridge v. Williams, 397 U.S. 471, 485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., *supra,* 220 U.S. at 78. This Court has often recognized that the practical problems of lawmaking sometimes justify, and even require, "rough accomodations, illogical, it may be, and unscientific," Metropolis Theater Company v. City of Chicago, 228 U.S. 61, 69, 70 (1913) and has acknowledged that " 'the demand for perfection must inevitably compromise with the hard facts of political life. . . .' " Vance v. Bradley, 440 U.S. 93, 108, n. 26 (1979), quoting Tussman and ten Broeck, The Equal Protection of the Laws, 37 *Calif. L. Rev.* 341, 350 (1949).

refute every conceivable basis for the law, and they must do so so thoroughly as to leave no reasonably doubt of the Act's unconstitutionality.

The significance of this "conceivable basis" standard is that a reviewing court does not sit to determine whether *it* is persuaded that the legislative facts and judgments underlying a statute are true, but only to determine whether the *legislature* could have conceived them to be true. Thus, the court does not sit as the arbiter of legislative fact, and is not at liberty to re-determine the facts as found by the legislature.[31] As this Court has recently observed:

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based *could not reasonably be conceived to be true by the governmental decisionmaker.* [citations omitted]. As we have said in a slightly different context:
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> *'The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion* or even to reject the legislative judgment on the

[31] In this respect, the function of the reviewing court is analogous to that of a judge who sits with a jury in a criminal case, where the prosecution must negate every reasonable possibility of innocence. All admissible evidence, whether incriminating or exculpatory, must go to the jury. It is for the jury, and not the judge, to weigh the credibility of the evidence and to determine its significance and the inferences to be drawn therefrom. The jury's determination will not be set aside by a court unless it is inconceivable that a reasonable person could find as the jury did. Here, the fact-sifting "jury" is the legislature itself, and its determination may not be set aside merely because a court might have been persuaded to reach a contrary determination.

> basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was pure speculation.' *Firemen v. Chicago, R.I. & P. Co.*, 393 U.S. 129 (1968) at 138-139, 89 S.Ct. at 2567.

Vance v. Bradley, 440 U.S. 108, 110, 111 (1979), (emphasis supplied).[32]

Thus, it is not the province of the court to sift and weigh conflicting evidence supporting, or opposing, a statute. The merits of the statutory classification "are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard."[33] Nor may the court "hear and examine evidence for the purpose of deciding again a question which the legislature has already decided."[34] Rather, once the legislature has drawn a classification, "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."[35] The function of the court, therefore, is merely to make sure that the legislature has exercised a reasoned judgment and not to exercise or substitute its own judgment.

This principle is crucial here. Equally significant is the inextricable corollary that if the factual determinations underpinning a statute are at least fairly debatable, the statute can-

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[32] *See also* McGinnis v. Royster, *supra*, 410 U.S. at 274, (finding that the legislature "could have concluded rationally that" certain facts were true); Williamson v. Lee Optical of Oklahoma, Inc., *supra*, 348 U.S. at 489, (holding that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think.*") (emphasis supplied).

[33] Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939).

[34] *Id.*

[35] United States v. Carolene Products Company, 304 U.S. 144, 154 (1938).

not be overturned.[36] Nor may the court substitute its view on debatable questions of social or economic policy for the judgment of the legislature.

> " 'Whether the enactment is wise or unwise, . . . whether it is based on sound economical theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and *the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*' "

Bayside Fish Flour Co. v. Gentry, 297 U.S 422, 428 (1936), *quoting* Chicago, B. & Quincy R. R. Co. v. McGuire, 219 U.S. 549, 569 (1911).[37]

Nor is it the business of the court to hypothesize about the feasibility of possible alternative statutory classifications[38] or to decide for itself whether a statute will ultimately achieve its purposes. This principle was reiterated by this Court

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[36] *See e.g.*, United States v. Carolene Products, *supra*, 304 U.S. at 154, upholding the regulation of interstate commerce in filled milk products, where the decision to regulate was "at least debatable"; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 430 (1936), refusing to consider arguments against a statute regulating fish processing, where the arguments did "no more than demonstrate that the question is debatable"; Euclid v. Ambler Realty Company, 272 U.S. 365, 388 (1926), holding that if the validity of the classification contained in a zoning ordinance "be fairly debatable," the legislative judgment must control.

[37] It is significant that in the Bayside Fish Flour case, *supra*, this Court sustained the dismissal of a complaint challenging the statute in question. This Court had no hesitation in rejecting the challenge and the allegations of the complaint, without requiring evidence of record to support the statute, and without affording the challengers an opportunity even to present factual evidence in support of their challenge.

[38] Caban v. Mohammed, 441 U.S. 380, 393, n. 13 (1979); Lalli v. Lalli, 439 U.S. 259, 274 (1978); Matthews v. Lucas, 427 U.S. 495, 515 (1976).

recently in upholding a Maryland statute requiring divestiture of service stations owned by oil refiners, despite the refiners' argument that the law would defeat its own purposes. This Court held:

> The evidence presented by the refiners may cast some doubt on the wisdom on the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'. . . ." *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93 (citation omitted). . . . Appellants argue that [the statute] . . . is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But, as the Court of Appeals observed, *this argument rests simply on an evaluation of the economic wisdom of the statute*, 279 Md., at 428, 370 A.2d, at 1111, and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 93 L.Ed. 212. *Regardless of the ultimate economic efficacy of the statute*, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellant's due process claim.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124, (1978) (emphasis supplied).[39]

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[39] *See also* Bayside Fish Flour Co. v. Gentry, *supra*, 297 U.S. at 427, 428, in which this Court stated:

> These provisions have a reasonable relation to the object of their enactment . . . and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose.

Thus, based on a now unbroken line of cases stretching over generations, it is manifest that an economic regulation may not be set aside merely because the court is unconvinced of its wisdom or utility. Rather, the statute must be upheld if, on the basis of logic, inference, judicial notice, evidence of record, or merely on searching its own mind, the court can conceive of any reasonable "basis in practical experience"[40] for the statutory classification, or any combination of legitimate public objectives which may be furthered by the statute. It follows from this that the statute must be sustained if there exists any line of rational thought which supports the view that some public purpose will be better served by passing the Act than by not passing it. The State further submits that this "conceivable rational basis" standard precludes the invalidation of a statute unless a challenger has proven that the statute is either (a) logically inconsistent with the furtherance of any possible public purposes, or (b) necessarily dependent upon factual premises which have been shown, beyond any reasonable debate, to be false.

These principles have been applied by this Court in two cases strikingly similar to the case at bar. In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), this Court upheld a local ban on some, but not all, advertisements mounted on vehicles. Specifically, the regulation banned the use of advertising vehicles, generally, but permitted delivery vehicles to display advertisements for the vehicle owners' own products. This Court quickly dismissed a substantive due process challenge to this regulation, holding that the regulation's alleged relation to traffic safety had not been shown to be "palpably false", and that a court does not sit to weigh evidence,

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[40] McGinnis v. Royster, *supra*, 410 U.S. at 276, quoting South Carolina v. Katzenbach, *supra*, 383 U.S. at 331.

to determine whether a regulation is appropriate, or to pass judgment on its wisdom.

The Court then turned to the contention that the exemption for owner-displayed advertisements had no relation to traffic safety, and thus denied equal protection. The Court held:

> The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.
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> We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. And *the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial.* It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

Railway Express Agency v. New York, supra, 336 U.S. at 110 (emphasis added, citations omitted).

Most recently, this Court reached the same conclusion in *City of New Orleans v. Dukes,* 427 U.S. 297 (1976), in upholding

an ordinance which banned the sale of food from some, but not all, pushcarts in the historic French Quarter of New Orleans. Specifically, the ordinance contained a "grandfather clause" which effectively authorized several pushcart vendors to continue operation. The Fifth Circuit Court of Appeals had held that there was no rational basis for this grandfather clause. This Court's analysis, and its grounds for reversing the Court of Appeals, are highly instructive, if not dispositive, in this case. The Court stated:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distrinctions may be made with substantially less than mathematical exactitude. *Legislature may implement their program step by step, . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.* . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom of desirability of legislative policy determinations made in areas that neither affect fundamental rights not proceed along suspect lines, . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. . . .
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> . . . .
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> It is suggested that the "grandfather provisions," allowing the continued operation of some vendors was a totally arbitrary and irrational method of achieving the city's

purpose. *But rather than proceedings by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible.* The governing constitutional principle was stated in *Katzenbach v. Morgan, supra,* 384 U.S., at 657, 86 S.Ct., at 1727:

> "[W]e are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward,* 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, that *a legislature need not 'strike at all evils at the same time,' Semler v. Dental Examiners,* 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086, and that *'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical Co.,* 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563."

City of New Orleans v. Dukes, supra, 427 U.S. at 303-305, (citations and footnote omitted, emphasis supplied).

Has the Minnesota Supreme Court applied the foregoing principles in its analysis, the instant Act would necessarily have been upheld. It is this failure to adhere to the appropriate standards of review which explains the erroneous result below. It is therefore essential that these governing standards be kept firmly in mind in reviewing the decision of the Minnesota Court.

II. THE OPINION OF THE LOWER COURT, ON ITS FACE, COMPELS REVERSAL.

The Court need look no further than the written opinion of the Minnesota Supreme Court to see that the Act meet constitutional standards. That opinion recognizes that the Act deals with legitimate state interests. (A-35) Furthermore, it recognizes that there is evidence both in support of, and against, the Act's wisdom and utility in meeting public needs.

The court's "yes, but . . ." analysis of the record and arguments clearly demonstrates the existence of debatable factual and policy issues, the resolution of which ought to be left to the legislature, and the very existence of which must preclude any constitutional invalidation of the Act under general Fourteenth Amendment standards. The Minnesota Supreme Court, however, apparently shared the trial court's mistaken view that, because voluminous evidence was introduced, "[t]he Court, as fact-finder, is obliged to weigh and evaluate this evidence, much of which was in sharp conflict." (Opinion of District Court, at A-25) Thus, the court undertakes an exhaustive process of sifting and weighing the evidence, in direct disregard of this Court's repeated pronouncements.

First, the Minnesota Court undertakes to resolve, contrary to the legislative determination, conflicting evidence concerning solid waste and energy distinctions between the plastic and paper containers. Thus, the Minnesota Court concedes that both the MRI Report and the opinion of a solid waste expert indicate that the plastic container consumes more landfill space than any other container, but the court goes on to balance that evidence against non-expert testimony, deciding that the State's solid waste data is "inconclusive" and not "convincing". (A-37, 38) Therefore, rather than asking

whether evidence supports the *legislature's* determination, the court holds only that "[t]he *trial court's* finding that plastic nonrefillables and paper containers occupy the same amount of landfill space is also justified by the evidence." (A-26, emphasis supplied)

Likewise the court conceded that MRI figures support the conclusion that plastic containers consume more energy than paper ones. (A-40) But the court goes on to determine whether other figures, assuming a lower container weight, and ignoring energy recaptured from wood wastes, provide a more "meaningful" comparison. (A-40, 41)

In addition to resolving such factual disputes against the legislative judgment, the court undertook to evaluate the legislative policy of proceeding one step at a time in seeking to discourage non-returnable containers by first banning the plastic container. The court recognized that plastic containers are highly fossil fuel intensive in comparison to paper containers, which use renewable wood products (A-42), but went on to ask whether it felt that the amount of oil and gas which would be saved is significant or "negligible". (A-41, 42) The court concluded that the millions of cubic feet of natural gas involved are too small a volume for legislative attention.

The Minnesota Court further acknowledges the possibility that the legislature may have sought to prevent irreversible capital investments in the throwaway plastic container. In response, the court notes only that throwaway plastic containers were already being sold in "many areas of the state". (A-44) Furthermore, the court fails to respond to the obvious observation that promotion of the preferable returnable and pouch containers would be more difficult if economic reliance upon the plastic container were to become a fixed addition to the existing reliance upon paper containers. Rather, the

court simply declares that it is "uncertain" whether further legislation concerning the paper container will later be enacted (A-44) and that it is not proven that paper containers will "cease to be used". (*Id.*) Based on scant evidence, the court then undertakes to predict that a market without throwaway plastic containers will never, in any case, move more to returnables. (A-42) Nowhere does the court discuss the relative competitive strength of the plastic and paper gallons. Neither does the court address the economic and social consequences of banning both the plastic and paper containers at once, a step which would force most dairies to totally convert all packaging systems. As Justice Wahl further notes, the majority wholly ignores the merits of the pouch container which has enjoyed substantial market success in Canada (A-49), and which may well gain acceptance in Minnesota if throwaway plastic jugs are eliminated. Thus, the opinion of the Minnesota Court demonstrates plainly that there exist issues of fact and policy which call for evaluation of the weight and emphasis to be accorded conflicting information, and for the drawing of inferences therefrom, to determine whether the Act will further the admittedly legitimate interests of the State. The very existence of such questions requires that their resolution be left to the true finder of fact and determiner of policy in this case, the legislature.

III. THE RECORD ALSO SUPPORTS THE CONSTITUTIONAL VALIDITY OF THE ACT.

Even if this Court finds it necessary to go beyond the face of the Minnesota Court's opinion and to inquire into the evidence adduced at trial, it is apparent that the decision of the Minnesota legislature to prohibit plastic containers in 1977, but not simultaneously to prohibit paper containers, is rationally related to legitimate state interests and is nor arbitrary.

A. The Act Is Rationally Related To The Encouragement Of Environmentally Superior Containers.

There is no dispute that the legislature may properly be concerned with the problems of resource use and solid waste disposal attributable to throwaway packaging.[41] It is furthermore apparent that conservation of energy in general, and fossil fuel in particular, are matters of vital public concern. Disposable milk packaging constitutes a portion of the general problem of disposable packaging.[42] Thus it can hardly be

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[41] Solid waste, particularly solid waste from packaging, is an increasingly serious problem both nationally and in the State of Minnesota. National solid waste generation of 144 million tons in 1973 is estimated to reach 200 million tons by 1985. (T. 493, 494) In 1974, 1.25 million tons of solid waste was generated in the Twin Cities Metropolitan Area alone. (T. 496) Approximately 35 percent of municipal solid waste is attributable to packaging. (T. 494) While waste figures relating to weight are helpful, volume is of greater concern in disposal since the vast majority of solid waste is dealt with by means of disposal in landfills and dumps. (T. 495)

[42] A study by Franklin Associates Ltd. indicated that in 1973, milk containers accounted for an estimated 115,000,000 cubic feet of such waste nationwide. (Plaintiffs' Exhibit Q, at 22, T. 189, 190) This figure represents 1.15-2.3 percent of total solid waste by volume as opposed to about .36 percent by weight. (*Id.* at 17) The State's expert witness, Harold Samtur, testified that, if the MRI Report's figures on waste volume are correct, milk containers may actually constitute 5 or 6 percent of the volume of solid wastes. (T. 616)

said that the prohibition of the plastic container conflicts with the overall goal of discouraging such containers and encouraging containers which cause fewer environmental problems. If it would be rational and proper for the legislature to strive ultimately to eliminate both the plastic and paper containers, it is simply wrong to say that prohibition of the plastic container is not rationally related to that end.

In its decision below, however, the Minnesota Court sought to predict for itself whether the prohibition of the plastic container, at one point in time, would, by itself, significantly reduce the impacts associated with throwaway containers in general. The Minnesota Court's "finding" that it is conclusively established that the Act will not encourage the use of returnables is no more than the sheerest speculation. The prohibition of the plastic milk container, by itself, may lead to slowing or reduction in adverse environmental impacts, or further legislative action may be called for, but such things may be determined only with time and study. Since the Act has never been permitted to take effect, however, its potential effects cannot be known with certainty. As articulated well by Mr. Justice Frankfurter in *Am. Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553 (1949) (concurring opinion):

> Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that

> the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom, in a democratic society, it ultimately rests—the people.

Even if it were the business of the courts to determine whether a statute will or will not work, there is no compelling basis for the Minnesota Court's prediction. On the contrary, there is good reason to hope that the Act, once implemented, will not only be a holding action, as intended, but will also actually spur movement toward greater use of better containers. At trial there was conflicting speculation on this question. (*See, e.g.*, T. 339, 416, 569)

Some of plaintiffs' witnesses testified that their dairies' present intention, if the Act is upheld, is simply to return to use of the paper carton, rather than one of the better alternative containers. (T. 427) We know several things from the evidence, however. Before the plastic jug was introduced nationally, paper cartons had been "hovering" at 60 to 70 percent of the market (T. 76, 77) for at least a decade, with the remaining market shares held, apparently, by pouches or returnables. This suggests that these preferable containers were able to hold onto some stablized portion of the market. In Minnesota, at the time of trial, a number of dairies were still marketing returnable bottles. (T. 355, 356, 466, 467, 562, 563) Evidence nationally suggests, however, that once throwaway plastic jugs are permitted to take over the Minnesota market, these returnable bottles will disappear. (*See, e.g.*, T. 76, 420) According to plaintiffs' witness Robert Michael, consumers will, if given free choice, select the throwaway plastic jug over any returnable container. (T. 424, 425) Further, once dairies purchase expensive blow-molding machin-

ery, the dairies tend to adopt an offensive, rather than defensive, marketing strategy, and to "push" plastic jugs in order to reduce their per-gallon costs. (T. 436, 437) Thus, the plastic container tends to skew packaging choices, and to stack the deck against any movement to preferable containers.

Once this seductive option is removed, it is reasonable to believe that returnables and plastic pouches will have greater likelihood of success. The gallon paper carton is "probably the most cumbersome and least well thought of package in the entire industry." (T. 450) The possibility of further legislative action to ban the paper carton will also tend to discourage long-term investments in the manufacture of the carton. As dairies search for a better package, they are likely to look closely at both the plastic pouch and returnables, particularly if their investment capital is not tied up in machines for the manufacture of throwaway jugs.

It is quite possible, therefore, that returnables will make a comeback. With growing environmental consciousness, more consumers may well be willing to accept the slight inconvenience of returning empty bottles. Plaintiff Clover Leaf Dairy itself, in a 1976 letter to Minnesota legislators, acknowledged that "we *know* that the returnable system is environmentally superior." (T. 361, emphasis in original) The mere fact that Clover Leaf was unsuccessful in a 4-month experiment with returnables in 1976 (T. 334)—a fact cited by the lower court—is hardly reason to conclude that returnables cannot be sold, particularly in view of the fact that Clover Leaf had demanded an unrealistically high deposit of one dollar per bottle (T. 369), the full amount Clover Leaf had paid for the bottles when it purchased them. (T. 339)

In addition, more dairies may move to the plastic pouch, which has had great success in Ontario, even before the throw-

away plastic jug was banned there. (Endicott Depo. Exh. 6 at 2, 5, 6) In the four years prior to that 1972 ban, the plastic pouch had moved from 0 to 13 percent of the Ontario market. (Endicott Depo. Exh. 6 at 5, Endicott Depo. 21)[43] Plaintiffs' witness Robert Michael, who had never actually seen the pouch container (T. 444), testified that his dairy, Wells, had bought out another dairy which was selling milk in pouches, but had immediately discontinued the sales in order to go to the disposable plastic jug. (T. 444, 445) In view of the uncontested environmental advantages of the pouch, and in view of the fact that many dairies already market larger pouches for commercial and institutional use (T. 334, 421, 422), it is not unreasonable to hope that, once the plastic jug is gone, dairies such as Wells will consider use of the pouch.

Thus, the Act may well lead to greater use of better containers. If this expectation is not realized, and if the Act serves only as a holding action, to prevent entrenchment of an undesirable container, it may later prove necessary to take a second step, and to ban paper cartons, as was done in Ontario. (Endicott Depo. 8-10) In either event, the Act will have furthered legitimate public purposes.

Furthermore, the decision to prohibit the plastic container initially, rather than the paper one, or both containers, is rational despite the argument that environmental and resource goals might be more quickly accomplished by simultaneous prohibition of both plastic and paper containers. As in the case with substantive due process analysis, a determination to take a particular regulatory first step as opposed to some other step need only have a rational basis. *See, e.g., City of New Orleans v. Dukes, supra.* Clearly, the decision of the

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[43] By 1976, pouch containers held 40 percent of the Ontario market. (Endicott Depo., Exh. 6 at 5)

Minnesota legislature, to prohibit the plastic container at once and defer any action on the paper container, was neither arbitrary nor irrational. Numerous factors may have legitimately distinguished the two containers in the legislative mind.

B. The Act Rationally Minimizes The Economic And Social Dislocation Associated With Movement Toward Greater Use of Environmentally Superior Containers.

First, by acting when it did, the legislature had the opportunity to prevent major, long-term financial commitments to the establishment of another undesirable container system. In 1976, the paper container had predominated in Minnesota for many years. (T. 76) Use of the paper carton requires the purchase of blanks which are formed, filled and sealed on machinery which is leased, rather than owned, by the dairy. (T. 247, 248) Despite the national trend, the plastic system was late in arriving in Minnesota. (T. 295) In 1976, only one dairy in Minnesota had invested in the machinery necessary to produce the plastic container. (T. 458, 459) In late 1976, however, numerous Minnesota dairies were on the verge of substantial investments in blowmolding equipment needed to produce the plastic container. (Defendant's Exhibit 1, T. 259-263, 628) In fact, six dairies had placed orders for such machinery, which costs hundreds of thousands of dollars per machine. Given the legitimate concern of the State over the impacts of such throwaway containers, the legislature could plainly see[44] the purpose in preventing substantial new commitments to a system of throwaway containers which consume substantial quantities

[44] *See* statements of Senators Luther and Spear, *supra*, pp. 8-11, 13.

of fossil fuels,[45] only to become a waste disposal problem after a single use.

Thus the legislature acted, not to promote the paper container, but to prevent the unnecessary establishment of economic commitment to, and reliance upon, the plastic container. The prohibition of both the plastic and paper containers at once, however, would have presented an entirely different question. While substantial widespread economic commitment to the plastic container had not yet occurred in Minnesota, nearly all dairies were already selling most of their milk in paper containers of various sizes.

This Court has itself recognized that differing levels of established economic reliance constitute a rational basis for step-at-a-time regulation, even where this approach leads to distinctions between individuals involved in exactly the same activity. In *City of New Orleans v. Dukes, supra,* 427 U.S. at 305, for example, the Court noted that:

> rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. . . .
>
> The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the "grandfather clause"—both of whom had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre.

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[45] *See* discussion, *infra,* pp. 49-52.

Indeed, recognition of more established interests is the basis of every sort of "grandfather" provision. The legislature may rationally direct its efforts toward newly established aspects of a larger problem, so as to prevent the proliferation of the evils with which it is concerned. *See, e.g., United States v. Maryland Savings-Share Insurance Corporation*, 400 U.S. 4, 6, 7 (1970).

The simultaneous prohibition of both plastic and paper containers could easily have been perceived to present serious economic and social problems not associated with prohibition of the plastic container. Minnesota dairies would have been required to completely convert their bottling and delivery systems at once. Compelled complete and simultaneous conversion could well have led to serious difficulties in obtaining, installing, financing and learning the equipment and systems needed for returnable or pouch delivery. Aside from the potential hardships to the dairies themselves, any inability to convert smoothly or on time could result in temporary inability to deliver milk in adequate quantities, or at all. (*See, e.g.*, T. 474)

Such a situation would both deprive consumers of a vital commodity and reduce or eliminate the ability of dairy farmers to sell their product. It cannot be denied, therefore, that in moving to discourage one-way containers, the legislature could recognize the obvious difference between halting the onslaught of the plastic gallon container, and compelling the simultaneous industry-wide conversion of nearly all existing packaging systems.

C. The Act Rationally Eliminates The Single Greatest Competitive Barrier To Acceptance Of Superior Containers.

Second, the legislature may well have viewed the plastic container as constituting a greater competitive barrier to acceptance of returnable or pouch containers than the paper container. It is clear that the paper gallon container is not popular with consumers. It is awkward, subject to leaking and breakage and difficult to seal. (T. 77, 78, 450)

The disposable plastic container, on the other hand, is a favorite from a pure convenience standpoint, as demonstrated by its rapid rise in popularity. Therefore, it may be expected that consumers would more readily accept returnables or pouches as an alternative to the paper container than as an alternative to the more seductive plastic jug. Furthermore, to the extent the dairy industry has capital to expend in moving away from paper to other packaging, the likelihood of movement to returnable or pouch containers is reduced or eliminated if that capital is committed to the plastic throwaway jug.

Thus, by removing the plastic non-returnable as potential competition for the consumer's attention and the dairies' investment dollar, the chances that such attention may be directed to other, preferable alternatives is markedly improved. Whether or not the Act will, in fact, achieve the hoped-for results remains to be seen. Its enactment is, in any event, fully consistent with its goals. Therefore, quite apart from the question of whether the plastic or paper container is the "worst" in any particular environmental category, there exist legitimate policy reasons for the legislative decision to move first to head off the plastic container. The Minnesota Court,

however, almost totally ignored these concerns, stressing instead the question of whether in the court's opinion the plastic or paper container was the worst, environmentally. Even with respect to this question, however, there exists evidence that with particular respect to energy and disposability it is not irrational for the legislature to view the plastic container as having the worst impact of all available containers, including paper.

D. The Act Is Rationally Related To Goals Of Energy Conservation.

The Court can take judicial notice of the dire situation in this country and throughout the world with respect to supplies of petroleum and natural gas. Monumental efforts are underway at all levels of government to eliminate unnecessary consumption of these resources and to shift usage where possible from oil and natural gas to other resources which are either renewable or more abundant.

This is not an altogether recent phenomenon. For example, in *Walls v. Midland Carbon Company, et al.*, 254 U.S. 300 (1920), this Court upheld a Wyoming law aimed at the elimination of wasteful and extravagant use of natural gas. In *F.P.C. v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1 (1961), the Court took notice of the fact that, even then, "No one disputes that natural gas is a wasting resource and that the necessity for conserving it is paramount." (*Id.* at 8, footnote omitted) There, this Court upheld an F.P.C. action based, in part, upon the determination that use of gas in industrial boilers was an inferior use for gas and alternative fuel sources should be favored. No one would argue here that the need for conservation is less acute for oil. Given the problems of

the times it cannot be said that a legislative effort to prevent waste of such important resources is improper. One can hardly conceive of a more frivolous and extravagant use of such resources than to convert them into a product which is used once and thrown away, where legitimate, readily available alternatives exist.

The plastic container at issue here is made from high density polyethylene, which is produced from oil and natural gas feedstocks. (T. 305, 306, 313) In raw materials alone, a single 65-gram plastic container consumes 3.388 cubic feet of natural gas.[46] A single 70-gram container requires 3.64 cubic feet of natural gas, in raw materials alone.[47]

In contrast, except for a thin low density polyethylene coating, the paperboard container is made from wood, a renewable resource. In addition, 28 percent of all the energy consumed in the process of manufacturing, filling and delivering a gallon of milk in a paper container is derived from burning wood wastes. (See Table, p. 18, *supra*)

While plastic refillables are also made from polyethylene, the fact that these containers can be reused more than 150 times (Plaintiffs' Exhibit I, at 49, Endicott Depo., at 90, 91) reduces proportionally the amount of fossil fuels devoted to delivering a single gallon of milk. Likewise, the plastic pouch consumes much less fossil fuel per gallon of milk.

Therefore, the legislature plainly could conclude that the throwaway plastic container represents an unnecessary waste of fossil fuel in light of the fact that other available containers would require much less consumption of oil or natural gas for the delivery of a gallon of milk to the consumer.

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[46] See footnote 13, *supra*.

[47] This figure is derived by extrapolating the figure for a 65-gram container, as calculated in footnote 13, *supra*.

Furthermore, the gross energy data complied in the MRI Report demonstrates that the plastic container is the greatest overall energy consumer. The distinction is particularly pronounced when the paper container is credited for power generated from wood wastes. *See* page 18, *supra*. The Minnesota Court, however, was not content simply to determine whether there exists some basis upon which the legislature may have distinguished between plastic and paper on energy grounds. Instead, after conceding that the figures in the MRI Report support such an energy distinction, the court went on to determine that *if* those figures are used selectively and modified to assume lower container weights,[48] then the energy distinctions are "eroded." This approach inverts the well-established rule that, in constitutional litigation of this type, the issue is whether any view of the evidence *supports* the legislative judgment and not *vice-versa*. There is no reason why the legislature is compelled, as a matter of law, to share, in the face of contrary evidence, the Minnesota Court's assumption that all plastic containers weigh 65 grams. Neither must the legislature ignore the fact that a large amount of the energy used to produce paper containers is generated from waste wood, simply because plaintiffs assert that the petroleum industry also uses unspecified quantities of so-called "waste" gases to power "various processes." Neither must the legislature accept the Minnesota Court's unlikely proposition that the amount of fossil fuel used for non-fuel purposes will be unaltered. In fact, Phillips Petroleum Com-

[48] (A-41) The court's determination that the average plastic container weight in Minnesota is 65 grams, ignores the fact that representative containers introduced at trial by plaintiffs weighed up to 71.4 grams, (T. 341, 432-434) and that the plastic closures introduced at trial weighed nearly twice as much as those assumed in the MRI Report.

pany, as a plaintiff, claims that its sale or natural gas derivatives for milk bottles will be reduced if the Act is upheld. It is logical to assume that if less of these derivatives is sold, less will be produced. If less is produced, the fuel feedstock will be available for other uses.

Thus, despite the statements of the Minnesota Court, the fact is that there exist ample bases for a rational distinction between plastic and paper on energy grounds.

E. The Act Is Rationally Related To Solid Waste Disposal Goals.

There is also evidence that the plastic container consumes greater space in landfills than does any other container. While plaintiffs offered evidence concerning the potential recyclability and incineration characteristics of various containers, almost all consumer solid wastes in Minnesota are presently, and will be for the foreseeable future, disposed of in landfills and dumps.

The Weyerhauser Study, the results of which were adopted in the final MRI report, (T. 170, Ades Depo. 14, Plaintiffs' Exhibit I, at 5) concluded that the plastic container possessed a much greater spring-back tendency than did the paper container, and indicated that it occupies more than twice the landfill space of a paper carton. Data developed in Ontario supported this conclusion. *See* table, p. 21 *supra*. Furthermore, the spring-back of the paper container may be further reduced by becoming soggy, a tendency not shared by the plastic container. (T. 215)

Opinion evidence and analysis offered by the plaintiffs questioned whether the studies prove, conclusively, that the plastic container consumes substantially more landfill space. Even if this date does not prove beyond dispute that plastic

consumes more space, however, it certainly demonstrates that there is ample basis for the legislature to believe that this is the case. While witnesses for the plaintiffs were not completely confident of the landfill volume figures, they pointed to no hard evidence that the plastic containers do not have a greater tendency to create void space. Indeed, the final MRI Report, approved by both the MRI and E.P.A., adopted the Weyerhauser figures as the best available data and rejected the assumption that the plastic and paper containers would consume the same space.

Furthermore, Harold Samtur, an expert in solid waste disposal, based upon his review of the available sources and his substantial training and personal experience, testified that the plastic container would indeed consume more landfill space. (T. 557, 558, 607) The fact that these conclusions might be disputed by plaintiffs is not of constitutional significance. The very existence of reasoned debate requires that the matter be resolved in favor of the legislative judgment.

CONCLUSION

In its effort to address the environmental and resource problems of throwaway milk containers, the Minnesota legislature could have precipitously banned all but returnable and pouch containers, thus assuring more environmentally sound packaging immediately, but at the expense of massive economic and social disruption. Instead, however, the legislature chose to proceed more cautiously, and to eliminate first the plastic container. For the reasons set forth above, that choice is fully consistent with logic and legitimate legislative policy. Based upon decades of decisions of this Court, the Act must survive Fourteenth Amendment assault. The decision of the Minnesota Court, however, forsakes rationality analysis for a quasi-legislative inquiry as to which container is the worst and into whether that court believes the Act will ultimately achieve its goals. In making this inquiry, the lower court has substituted its judgment for that of the elected lawmakers on the question whether the statute ought have been passed, or whether some other measure would have been better.

If the Minnesota Court's analysis is permitted to stand, a legislature will not have the option to choose a step-by-step approach in addressing a problem, because the Constitution itself will be read to require substantially assured results, provable in court to the satisfaction of a judge. Neither will a legislature have the ability to address that aspect of a problem which, to the legislature, appears most acute, unless a court agrees, upon its own criteria, that the legislature has indeed addressed the "worst" aspect of the problem. Nor will the legislature be able to address a problem at a time of its choosing.

Efforts at stemming the tide of economic, environmental and energy problems, however, do not lend themselves to agreement concerning the best point of attack, or to guarantees of future success. Measures must be tried and their effects observed. That which is helpful should be retained and built upon. That which proves counter-productive should be repealed by the legislature. It is the trying, however, that is essential. As stated in *American Can Co. v. Oregon Liquor Control Comm.*, 15 Or.App. 618, 517 P.2d 691 (1973), itself a packaging regulation case:

> Selection of reasonable means to accomplish a state purpose is clearly a legislative, not a judicial, function, to which the admonitive language from Firemen v. Chicago R.I. & P.R. Co., supra, 393 U.S. at 136 and 138-139, 89 S.Ct. 323, quoted above is clearly applicable. In particular, the courts may not invalidate legislation upon the speculation that machines may be developed or because additional and complementary means of accomplishing the same goal may also exist. The legislature may look to its imagination rather than to traditional methods such as those which plaintiffs suggest, to develop suitable means of dealing with state problems, even though their methods may be unique. Each state is a laboratory for innovation and experimentation in a healthy federal system. What fails may be abandoned and what succeeds may be emulated by other states. The bottle bill is now unique; it may later be regarded as seminal.
>
> We conclude, therefore, that the bottle bill was properly enacted within the police power of the state of Oregon and that it is imaginatively, but reasonably, calculated to cope with problems of legitimate state concern.

517 P.2d at 700.

The State therefore prays that this Court reverse the determination of the Minnesota Court that the Act is unconstitutional and return the review of the wisdom and utility of the statute to the legislature, where it properly belongs.

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No. 79-1171

IN THE

Supreme Court of the United States

October Term, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court correctly hold that a statutory ban on the sale of milk in nonreturnable, nonrefillable plastic containers violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does a statutory ban on the sale of milk in nonreturnable, nonrefillable plastic containers discriminate against or unreasonably burden interstate commerce in violation of Article I, Section 8 of the United States Constitution?[1]

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[1] This question was not decided by the Minnesota Supreme Court and is therefore not raised by the petitioner. It was included in the Complaint, decided by the trial court, fully briefed and argued before the Minnesota Supreme Court, and asserted in respondents' brief in opposition to the State's petition for certiorari. Respondents may therefore assert it in support of the judgment of the Minnesota Supreme Court, and it is appropriate for this Court to decide this question if it does not invalidate the statute on equal protection grounds. New York City Transit Authority v. Beazar, 440 U.S. 568, 582 n.24 (1979); Hankerson v. North Carolina, 432 U.S. 233, 240 n.6 (1977); California Bankers Ass'n. v. Schultz, 416 U.S. 21, 71 (1974); Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).

The Minnesota Supreme Court concurred with the trial court's determination that the statute also denies substantive due process of law but did not decide this question directly. (A. 45 n.20.)

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The evidence in this case is crucial to its determination. The Statement of the Case in the Minnesota Attorney General's brief is neither complete nor accurate. To avoid undue length and repetition, plaintiffs will review the environmental and economic impacts of the statute in their argument.

Laws of Minnesota 1977, Chapter 268 (the Act) imposes an absolute ban. It is a crime to sell milk in nonrefillable[2] plastic containers under any circumstances.

Milk is the only commodity affected by the Act. No plastic container is banned unless it is filled with milk, even though the same container is used for fruit juices (R. 445, 457) and similar plastic containers are used for many other substances, including windshield washer fluid, laundry bleach and household cleaners.

Minnesota is the only state that has banned any kind of milk container. Other container legislation has been directed at the safety and environmental problems caused by the littering of beer and soft drink containers—problems distinctly different from those allegedly addressed by the Minnesota statute at issue in this case.

The Minnesota Pollution Control Agency has no plans to propose any further action on the subject of milk containers. (R. 648-649.) Since passage of the Act, no further legislation regarding milk containers has been proposed.[3]

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[2] A container can be returnable without being refillable, e.g., the plastic milk bottle at issue here can be returned for recycling but cannot be used again to package milk. Throughout this brief the term "nonrefillable" is used to describe containers which cannot be used again to package milk.

[3] Nor does the U.S. Environmental Protection Agency, which commissioned the milk container study done by the Midwest Research Institute (R. 152), have any plans to propose such action. (Ades Deposition, received in evidence, p. 18.) The *amicus curiae*

The unique nature of this Minnesota statute is explained by its true purpose. While giving lip service to environmental concerns, the legislative debates indicate that the intent of the bill was to discriminate against the out-of-state plastics industry. As discussed in detail in our argument, the bill's proponents wanted to isolate local industries from out-of-state competition under the guise of environmental legislation.

SUMMARY OF ARGUMENT

The Minnesota Supreme Court, in declaring the Act violative of federal equal protection guarantees, has not assumed the role of "super-legislature." While legislative bodies enjoy great latitude in dealing with perceived social evils, that latitude is not unlimited. It must be exercised within constitutional limits. The Court's role, central to the functioning of our political system, is to safeguard those limits. It does so by applying established standards to facts of record.

Plaintiffs introduced evidence necessary to meet the substantial burden they carried in challenging the constitutionality of the Act. The Minnesota courts made extensive findings of fact which are amply supported by the evidence and concluded that no credible facts exist upon which the legislature could rationally base the classification contained in the Act; it is not rationally related to furthering any of its alleged environmental purposes.

A legislature may act step-by-step to ameliorate a perceived evil. The mere fact that the legislature has acted does not mean, however, that such a step has been taken. The step must be rationally directed toward a legitimate goal. Eliminating

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brief of the United States notwithstanding, no agency or department of the United States has recommended statutory or regulatory action to ban or otherwise restrict the use of plastic or any other type of milk containers.

the plastic milk bottle, thereby transferring its market share to the environmentally inferior paperboard container, cannot rationally be perceived as likely to further the stated environmental goals of the Act.

The Court's peculiar role in safeguarding the constitutional limits of legislation is particularly important when legislation has interstate consequences. Those consequences are of less concern to a legislature than local ones. The illusory nature of the stated environmental purposes of the Act is understood by an examination of its true purpose as revealed by the legislative debates and by its practical effect: to protect local paper and timber interests against competition from the out-of-state plastics industry. The Act exceeds Commerce Clause limitations because it is "hostile in conception as well as burdensome in result." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 381 (1976).

The Act contravenes the Commerce Clause even without a finding of discriminatory motive. It discriminates in its operation, and the stated goals can be promoted with less discriminatory and more effective alternatives. Moreover, the substantial burdens on interstate commerce outweigh the illusory benefits of the Act.

ARGUMENT

I. THE EVIDENCE SUPPORTS THE FINDINGS OF THE MINNESOTA COURTS THAT THERE IS NO FACTUAL BASIS FOR BANNING THE PLASTIC MILK CONTAINER.

A review of the Minnesota courts' findings and the supporting evidence is provided here as a framework for the legal analysis to follow. This discussion utilizes primarily the semantics of equal protection because the Minnesota Supreme Court focused its decision on this issue. However, the same findings which compel the conclusion that the Act lacks rationality and thus denies equal protection also compel the conclusion that the Act is in conflict with Commerce Clause limitations.[4]

The Minnesota Attorney General suggests several public purposes to be served by Chapter 268. He claims that it is

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[4] This Court is bound by factual findings of lower courts unless they are clearly erroneous or the result of "a very obvious and exceptional showing of error," particularly when there are concurrent findings by two lower courts. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635-636 (1967). The Court has conducted an "independent review" of the evidence when the party challenging the lower court decision has asserted a constitutional right involving either procedural due process in a criminal case, *e.g.*, *Pierre v. Louisiana*, 306 U.S. 354 (1939), or civil liberties, particularly those under the First Amendment, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); Bachellar v. Maryland, 397 U.S. 564 (1970). But in cases affecting economic interests, *e.g.*, General Motors Corp v. Washington, 377 U.S. 436, 441-442 (1964), and even in some criminal cases, *e.g.*, Gallegos v. Nebraska, 342 U.S. 55, 61 (1951) and First Amendment cases, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963), the Court has deferred to lower court findings when they are supported by the evidence. *See generally* Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C. L. Rev. 223 (1968). In this case the Court is confined to the application of constitutional principles to the findings of the Minnesota courts because they have an evidentiary basis.

proper to ban only the plastic milk bottle because the container is new in Minnesota and that the Act will promote the use of refillable containers. The statement of policy in the Act asserts that the plastic milk bottle "presents a solid waste management problem for the state, promotes energy waste and depletes natural resources."

Neither Minnesota court found any rational nexus between these purposes and the means chosen to effect them. Furthermore, the trial court specifically found that the actual purpose of the Act was to protect private local economic interests from out-of-state competition, not to protect the environment.

A. The purpose of Chapter 268 was not to protect the environment, but to protect and isolate local private economic interests.

The evidence presented at trial revealed, as discussed below, that no legitimate environmental basis exists for this legislation. Transcripts of the House and Senate floor debates on the bill were received at trial and confirm the inferences that follow from this evidence: protection of the environment was not the real purpose of the Act.

The Minnesota Attorney General relies heavily on selected legislative speeches to buttress the asserted purposes of the Act. However, when the fallacies of these asserted purposes became apparent during the debates, proponents of the bill made it clear that their primary objectives were to insulate small dairies from competition and to protect local timber and paper interests from competition from the out-of-state plastics

industry. (See pp. 30-31, *infra.*) The trial court found these to be the actual purposes of the legislation. (A. 19, 22.)[5]

B. The plastic milk bottle has been widely used in Minnesota for years.

The Minnesota Attorney General argues that the Act was designed to prevent a new container from gaining a foothold in Minnesota. On the contrary, as found by the Minnesota Supreme Court, use of the container had been established in many areas of the state in the early 1970's. (A. 44.)

Marigold Foods, Inc. (Marigold) is a dairy with a trade area including most of Minnesota and several adjoining states. (R. 448.) It began using the plastic bottle in 1973.[6] (R. 449.) By 1978 Marigold no longer packaged any milk in paperboard gallons at its main plant in Rochester, Minnesota. (R. 453-454.) In 1977 the volume of milk sold by Marigold in plastic gallons exceeded its sales in paperboard gallons by almost 17 to 1. (R. 454.) At least one of its customers, Weber and Barlow Stores in Rochester, had completely discontinued purchasing milk in paperboard gallons in favor of plastic gallons. (R. 411.)

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[5] "12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry."

. . .

"23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268."

[6] Before 1973 the paperboard carton had become the predominant milk container in Minnesota, having virtually eliminated refillable containers from the market. (R. 467-468.)

Wells Dairy, Inc. (Wells), an Iowa dairy, also began use of the plastic bottle in Minnesota in 1973. (R. 421.) By 1978 its ratio of plastic gallon sales to paperboard gallon sales was 40 to 1 (R. 419), with the plastic gallon accounting for 60 percent of its total sales. (R. 426.) Approximately ten percent of Wells' milk sales is in Minnesota (R. 428), including one million gallons per year in plastic bottles. (R. 430-431.)

Clover Leaf Creamery Company (Clover Leaf), a Minneapolis-based dairy, first considered the use of the plastic bottle in the mid-1960's. (R. 326.) In 1971 the Minnesota Pollution Control Agency (MPCA) assured Clover Leaf that it would conduct studies on the environmental effects of the plastic container, causing Clover Leaf to cancel an order for a plastic bottle blow-molding machine. (R. 327-328.) No studies were ever conducted by the MPCA. (R. 645.) When the 1976 draft of the Midwest Research Institute study indicated that there was no environmental basis for preferring the paperboard carton over the plastic bottle, Clover Leaf decided to begin using plastic. (R. 330-331.) It ordered the machinery in 1976 (R. 331) and began production of the plastic bottle at its Minneapolis plant by January 1977. (R. 332.) It uses plastic throughout its market area, i.e. within 200 miles of Minneapolis. (R. 326, 332.) By January, 1978, approximately 60 percent of all milk sold by Clover Leaf in gallon containers was in plastic, the remaining 40 percent in paperboard. (R. 340.)

The plastic bottle has been used extensively by other dairies throughout the state, except in the Twin Cities metropolitan area, since as early as 1968. (R. 329, 353-354.)

Although Marigold, Wells and Clover Leaf have their own equipment for making plastic bottles, dairies need not have such equipment. Some have purchased plastic bottles from bottle manufacturers for several years and, more recently, from

other dairies with excess bottle-making capacity, at a price less than that paid for paperboard cartons. (R. 291-292, 303, 353-354, 427, 450.) In addition, the cost of the equipment was grossly exaggerated during the legislative debates. (R. 114, 247.)

Ample evidence supports the conclusions of the Minnesota courts that the Act may not be sustained as a measure to prevent the plastic bottle from gaining a foothold in the Minnesota milk market.

C. The Act will not encourage or promote a return to the use of refillable containers.

The Minnesota Attorney General argues that the Act is designed to halt the trend toward nonrefillable containers and promote the use of refillables. The trial court found "no credible evidence" to substantiate this claim. (A. 25.) The Minnesota Supreme Court concluded that "the evidence conclusively establishes" that this goal will not be furthered by the Act. (A. 42.)

In Minnesota the paperboard carton had virtually eliminated refillables from the market before plastic was introduced. Thus Minnesota consumers have switched, not from refillable bottles to plastic, but from nonrefillable paperboard to nonrefillable plastic. If Chapter 268 goes into effect, the dairies will go back to the paperboard carton. (R. 339-340, 427.) Some dairies do not even have the facilities necessary to wash refillable bottles, and regulatory restrictions (which did not exist in the days of the glass milk bottle) on the volume and content of sewage generated by the bottle-washing process

would pose serious problems for these dairies and the municipalities in which they are located. (R. 424-425, 454-455.)[7]

In 1977 Clover Leaf made a concerted but abysmally futile effort to revive the refillable milk bottle. (R. 332-340.) Consumers did not purchase milk in the refillable bottle, even when the only alternative in a particular store was the paperboard carton (R. 368-369) and even though the price charged to the retailer by Clover Leaf for milk in the refillable container was four cents less per gallon than the price for milk in either of the nonrefillable gallon containers. (R. 358.)[8] Clover Leaf had to take back large quantities of milk (R. 334) and finally sold several thousand unused refillable bottles at a loss. (R. 339.)

Since no other state has ever banned plastic milk containers, the Minnesota Attorney General points to the Province of Ontario as the model to be followed. However, even Ontario's ban (by administrative fiat), which included both the plastic container and the large paperboard carton, has failed. Consumers there have turned in large numbers to the third nonrefillable alternative, the plastic pouch. This is particularly significant because the refillable had high visibility and a very large market share in Ontario when the ban went into effect. The market share of refillables dropped from 47 percent when the ban was issued in 1971 to 19.7 percent in 1977. (Endicott Deposition, received in evidence, pp. 88-89; Endicott Depos. Ex. 6, p. 5.)

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[7] Refillable milk bottles also create sanitation problems which make the Minnesota Department of Agriculture reluctant to encourage their revival in Minnesota. (Pl. Ex. U; R. 335-337.)

[8] Clover Leaf acknowledges the environmental advantages of the refillable containers but is convinced that the use of refillables will not increase unless all nonrefillables are prohibited. (Def. Ex. 3; R. 339-340, 361-362.)

Plaintiffs' witness from the United States Environmental Protection Agency did not believe that the Act will cause refillables to make a comeback in Minnesota. (Ades Depos. pp. 20, 37-38.)

The evidence supports the findings of the Minnesota courts that Chapter 268 will not promote the use of refillable milk containers.

D. The Act will not aid in the management or control of solid waste. It will aggravate the environmental problems caused by solid waste.

The Minnesota Supreme Court concurred with the trial court and held that "the evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers." (A. 40.)

There are several methods of handling and reducing solid waste, including landfills, incineration, recycling, litter control, and source reduction. The evidence showed that with all applicable methods the plastic bottle is environmentally superior to the paperboard carton.

1. Landfills.

The predominant method of solid waste disposal is deposit in landfills. (R. 67.)

a. Leachates and methane gas.

The State's witnesses agreed that the worst environmental hazards posed by landfill operations are pollution of groundwater caused by leaching and the creation and escape of methane gas. (R. 594, 652.) The Metropolitan Council of the

Twin Cities has recognized the magnitude of these problems in existing landfills in the Minneapolis-Saint Paul area. (R. 595-597; Pl. Ex. AA.) The major objective in designing landfills is to control or minimize the effects of leachates and gases.

Both of these hazards are created by waste decomposition. Bacterial and other chemical reactions, combined with percolation of water and other liquids, create leachates that seep into the ground and ultimately into underground water. These same reactions create methane gas, which is both noxious and explosive. (R. 72-74, 385-386, 594.)

Paperboard milk cartons aggravate these problems when they are deposited in landfills because they decompose after the plastic coating is punctured or torn. (R. 73, 617.) Plastic bottles, on the other hand, are essentially inert and do not contribute to the creation of leachates and methane gas. (R. 72-73, 595.) Plastic is in fact used to make liners for landfills to prevent contamination of groundwater by seepage of leachates. (R. 73-74.)

The trial court (A. 20) and the Minnesota Supreme Court (A. 35-36) emphasized this distinction between the two containers.

b. Landfill stability.

Another disadvantage of waste decomposition is that it makes the landfill site unstable after it has been filled, thus preventing the site from being used for many kinds of building construction. (R. 72-73, 385.) Stable sites do, however, have many uses, including parking lots, playing fields, and ski hills. (R. 381-382.) Stability is also required to minimize cracking of the final landfill cover and the resulting generation of more leachates. (R. 385.)

As found by the trial court (A. 20) and Minnesota Supreme Court (A. 36), plastic bottles contribute to landfill stability; paperboard cartons do not.

c. Compaction of solid waste.

The procedure followed in collecting and depositing waste and the physical characteristics of plastic and paperboard containers indicate that plastic bottles consume no more space in landfills than paperboard containers, and that under total compaction plastic containers will consume even less space.

Waste is generally collected and transported to landfill sites in large trucks with hydraulic compacting equipment. During collection the waste is compacted to a small fraction of its original volume. (R. 386-387.) At the landfill, procedures and equipment are specially designed to compact the waste further and keep it compressed. (R. 383-384, 386, 394-395.) Compacting machines resembling large tractors have huge metal wheels with spikes or cleats to puncture and compact the waste. (R. 388-393; Pl. Ex. V, W, X, Y and Z.) They weigh approximately 50,000 pounds and can flatten steel drums, refrigerators and automobiles. (R. 389, 391-392.) When filled the landfill may be as much as 150 feet deep. (R. 386.)

The Minnesota Attorney General ignores the evidence adduced at trial when he asserts that the Midwest Research Institute (MRI) determined that plastic bottles occupy more landfill space than paperboard cartons. While the numbers in the MRI Report purport to indicate this, testimony by Plaintiffs' witnesses, Mr. Welch, the principal investigator from MRI, and Mr. Ades of the United States Environmental Protection Agency, and a review of the document which formed the sole basis for the compaction figures reveal that

these figures are erroneous.[9] Mr. Welch opined that there was insufficient evidence to conclude whether either gallon container would consume more landfill space than the other. (R. 194-195, 199-200.)

As indicated by the trial court (A. 25-26) and the Minnesota Supreme Court (A. 38), the contrary conclusions of Harold Samtur, the State's solid waste expert, were entitled to little credence.[10] His testimony demonstrated a remarkable lack of familiarity with the sources on which he purportedly relied and a corresponding disinclination to examine their validity and meaning.[11]

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[9] Neither witness Welch nor Ades believes these figures to be credible. (R. 173-174, 177-178; Ades Depos. pp. 15-16.) They were based on a three-page report supplied to MRI by the American Paper Institute. (R. 169-171, 197; Pl. Ex. O.) This document, though included by MRI as the only "study" available, was virtually meaningless because (1) it neglected to specify the weights of the containers used (R. 173-174), and (2) the test conducted did not even roughly approximate conditions in a landfill, e.g., it measured the volume of the containers after being crushed once with a laboratory device and then being totally released, with no continuing pressure being exerted on them. (R. 179-181.)

[10] The Minnesota Attorney General suggests that the mere existence of a difference of opinion is all that is necessary to sustain a statute. He is in error. Just as the presumption of constitutionality does not immunize a statute from judicial scrutiny, "nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack." Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194, 209 (1934). Courts are not bound to accept blindly the testimony of witnesses for any party in constitutional litigation. It is subject to cross-examination and evaluation the same as the testimony of any witness in any other trial. If an opinion is not legitimately founded or lacks credibility, the mere fact that it is asserted is without probative value.

[11] Samtur relied on three sources: (1) The MRI Report. He accepted the figures on post-consumer solid waste without examining their derivation and in spite of Welch's testimony about their inadequacy. (R. 604-605, 607-609.); (2) The "study" done in Ontario. (R. 604.) The Ontario researchers estimated the compaction ratio for a *refillable* plastic bottle and then assumed that the much lighter plastic nonrefillable would consume the same space. (Endicott Depos. p. 74.) They also used a nonrefillable plastic bottle that is not comparable to the bottle now used in Minnesota because it was almost 50 percent heavier and thus more difficult to crush. (Endicott Depos. pp. 9, 75-76.); (3) The so-called Eggshell Report, a 1969 study of disposability characteristics of containers which did not include milk containers in the samples used. (R. 508, 513, 574-575; 606-607.)

During cross examination of Mr. Samtur, counsel for Plaintiffs crushed samples of both the nonrefillable plastic gallon and the paperboard gallon with his bare hands. (R. 609-614, Pl. Ex. BB and CC.) Samtur estimated that the crushed volume of each container was between ten and twenty percent of its original volume. (R. 611, 613.) He acknowledged that there was virtually no springback of the plastic bottle after it had been crushed and released, and that any such springback could be eliminated by squeezing the container between the thumb and forefinger. (R. 611-612.) The State made no effort to rebut this demonstration.[12]

The Minnesota Supreme Court sustained the trial court's finding that the two containers occupy substantially the same amount of landfill space. (A. 36.) It also agreed with the trial court that Samtur's opinions had a "weak and inconclusive foundation" and "lacked convincing quality." (A. 38.)

2. Incineration.

Solid waste can be incinerated and used to create energy. This method of disposal will become more widespread as technology enables the economical use of the energy value of the heat generated by incineration. (Def. Ex. 9, pp. 33-44; R. 490.)

Both plastic bottles and paperboard cartons burn. (R. 186.) Plastic, however, has a much higher BTU value (R. 186), which results in the recovery of more energy than that recovered from burning paperboard cartons. (R. 68-71, 323.) Unlike paperboard, plastic also incinerates completely and does not emit noxious gases into the atmosphere. (R. 69-70.)

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[12] If total compaction is achieved, i.e., no void spaces are left in the containers, plastic containers will occupy less landfill space than paperboard containers, because the former contain much less raw material by weight and have a greater density. (R. 578-579.)

The trial court (A. 20) and Minnesota Supreme Court (A. 38-39) recognized these distinctions.

3. Recycling.

Another method of solid waste disposal is recycling. Plastic milk containers are recyclable because they can be reground and used to make a large number of other polyethylene products. Paperboard milk cartons are not recyclable because the paperboard and the plastic coating cannot be separated. (R. 74-76, 185-186, 346.)

Clover Leaf has a voluntary plastic milk bottle recycling program. It picks up plastic milk bottles that are returned to the retail stores, grinds them and sells the plastic material to a salvage dealer. (R. 346-348.) Similar programs exist elsewhere. (R. 75; Ades Depos. pp. 26-27.)

The Minnesota legislature has adopted an express statutory policy to encourage the reuse and recycling of materials. Minn. Stat. §116F.01. The trial court found that Chapter 268 does not promote this legislative goal. (A. 21.)

4. Litter control.

The State agrees that litter control is not one of the purposes of Chapter 268. (R. 646.) Milk, especially when purchased in large containers, is consumed in the home. The containers are not littered, but directly enter recycling or trash collection systems. (R. 76.)

Other container legislation throughout the country, including that cited by the Solicitor General (Brief for the United States as *Amicus Curiae*, p. 9), has been directed at the prob-

lems created by littering containers of other beverages. None of that legislation affects milk containers.[13]

The plastic milk bottle also differs from the paperboard milk carton and nonrefillable containers used for other beverages in that it is preferred by consumers for reasons other than disposal convenience. The screw-on cap prolongs the freshness of the milk and eliminates contamination by refrigerator odors. The built-in handle enables the user to pour with one hand even though the container is large. The paperboard carton does not have these features, and sanitation restrictions prevent the use of a refillable milk container with a screw-on cap or built-in handle. (R. 357-358, 365, 450.)

5. Source reduction.

The Act is cited by the Minnesota Attorney General as a "source reduction" measure, i.e., it allegedly will reduce the amount of solid waste to be handled. As discussed above, the Act is not rationally related to this purpose because it will not revive refillables and the amount of space consumed in landfills is substantially the same for the two presently used containers. The act is in fact counterproductive because, as stated by the Minnesota Supreme Court, "The major relevant source-reduction factor is the constantly declining weight of plastic nonrefillables." (A. 39.)

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[13] The instant statute is unprecedented. It is totally different in purpose and effect from all those cited by the Solicitor General and from those upheld by other courts. See Can Manufacturers Institute, Inc. v. Minnesota, 289 N.W.2d 416 (Minn. 1979); American Can Co. v. Oregon Liquor Control Commission, 15 Or. App. 618, 517 P.2d 691 (1973); Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954). The only other statute banning a plastic container has been invalidated. Juice Tree Hawaii, Inc. v. Yuen, 13 E.R.C. 1888 (Hawaii Cir. Ct. 1979). Plaintiffs do not challenge container legislation *per se*. The scope of this case is very limited, and it must be decided on its own facts.

The weight of the plastic bottle is little more than half that of the paperboard carton; it generates much less waste. While the weight of the gallon paperboard carton has remained at 115 grams for several years (R. 245, 344, 422-423), improvements in resin, machinery and design have substantially reduced the weight of the plastic bottle, even since 1973. (R. 244-245, 285, 310, 341, 423, 453.) This reduction causes a proportional decrease in the amount of raw material used, the amount of waste generated, and the other environmental impacts. (R. 168-169.)

The Act is also counterproductive insofar as it promotes the use of smaller containers. Source reduction is accomplished by packaging products in larger containers which reduces the amount of container material per unit of product. (R. 156, 584.) The plastic milk bottle is used in Minnesota only in the gallon size, thus promoting source reduction. Paperboard cartons are used in several sizes. Source reduction will be impeded to the extent that consumers, finding the plastic gallon unavailable, choose to purchase milk in smaller paperboard containers rather than in the cumbersome (R. 450) gallon size.

E. The Act will not aid energy conservation.

The energy argument advanced by the Minnesota Attorney General derives from the premises that plastic is inherently bad and that banning any plastic product will automatically result in more oil and gas being made available for fuel. Both the trial court and the Minnesota Supreme Court found, however, after reviewing the evidence discussed below, that the Act is not rationally related to achieving this result and that the paperboard carton actually consumes more energy than the plastic bottle. The energy conservation aspect of the Act

is illusory and the Act "is not reasonably related to the state's interest in preventing energy waste." (A. 42.)

Plastic milk bottles are made from high density polyethylene (HDPE), which can be derived from virtually any material that contains carbon and hydrogen, such as coal, water, and even air. (R. 30-31.) The principal current sources for HDPE and other plastics are crude oil and natural gas. (R. 31.)

The Minnesota Attorney General's assertion that plastic milk bottles consume natural gas that would otherwise be available for fuel is fallacious. The extraction of polyethylene from natural gas for productive use is a relatively recent phenomenon. (R. 32.) Ethane, from which polyethylene is derived, is a component of the natural gas stream that is used for petrochemicals. It used to be (R. 32) and sometimes still is (*see Wall St. J.*, June 10, 1980, at 11, col. 1 (East Coast ed.)) burned off as a "waste" product at refineries.

Much of the expert testimony at trial centered around the MRI Report. The testimony of Mr. Welch consisted in large part in clarifying the report in order to compare the energy impacts of the nonrefillable pastic and paperboard containers. Welch computed the impacts for 65- and 60-gram containers, because the Report studied the 70-gram container and the size in predominant use had since been reduced to 65 grams. (R. 245, 285, 341, 453.) These computations are contained in Plaintiff's Exhibit L (R. 157-158) and show that the impact of the plastic bottle is reduced in every category as the weight of the bottle is reduced. (R. 168-169.)[14]

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[14] Throughout the MRI Report and related exhibits (such as Exhibit L), a higher number means a greater, and thus environmentally more adverse, impact (e.g., pounds of material consumed, BTU's of energy used). (R. 159-160.)

All of the environmental impacts are greater for the paperboard half-gallon than for the paperboard gallon because the former uses more container material per unit of milk. (See Pl.

The MRI Report (and Exhibit L) computed two values for the energy impact of the paperboard container, one including and one excluding the energy value of the wood waste generated by the paperboard manufacturing process. (See Pl. Ex. I, pp. 3-4.) Welch testified that a meaningful comparison of the two containers requires inclusion of the wood waste energy. (R. 162-163.) This comparison (see Pl. Ex. L) shows that the paperboard carton uses slightly less energy than the 70-gram plastic bottle but more energy than the 65-gram and 60-gram plastic bottles.

The MRI Report recognizes that the true energy picture goes far beyond the nature of the raw material used. Welch concluded that the energy impact of the plastic bottle and paperboard carton systems is virtually identical. (R. 194, 199.) If one either includes the energy value of the raw materials for both containers or excludes it for both containers, then paperboard has a significantly greater adverse environmental impact. (R. 160-161, 163-166; Pl. Ex. M.) Moreover, the energy impact of the plastic bottle will continue to decline as the weight of the bottle continues to be reduced.[15]

Ex. I, pp. 8-9.) Comparing the plastic gallon to the paperboard gallon (as is done in Exhibit L) is therefore more favorable to the paperboard system than comparing the plastic gallon to two paperboard half-gallons. If the ban on plastic were to result in greater use of the paperboard half-gallon (because of the disadvantages which the paperboard gallon poses for the consumer), the adverse environmental effects of the Act would be greater than if consumers merely switched to the paperboard gallon.

[15] The State introduced voluminous exhibits and testimony regarding studies in Ontario which purport to show significantly greater consumption of energy by the plastic bottle. The Ontario studies are of little value because: (1) they used an 80-gram plastic bottle; (2) they arbitrarily excluded the energy consumed in manufacturing the paper container material (Endicott Depos. Ex. 13, p. 251); and (3) the more recent Ontario report on energy (Endicott Depos. Ex. 5), prepared supposedly because of improvements in energy analysis techniques since the first study (Endicott Depos. p. 18), did not even evaluate the nonrefillable plastic container. (Endicott Depos. p. 81.)

If anything, the Act will simply promote the greater consumption of energy and raw materials by the paper industry. It is noteworthy that no Minnesota industry consumes energy or raw materials to produce crude oil, natural gas, HDPE or any other plastic resin. (R. 167-168, 309.)

F. The Act will not lessen the consumption of natural resources.

Chapter 268 will not result in less consumption of natural resources, renewable or nonrenewable. As found by the trial court, "Both petroleum and wood are natural resources subject to depletion from innumerable sources, one of the least being milk containers." (A. 20.) The Minnesota Supreme Court stated, "The amount of crude oil and natural gas used for producing plastic nonrefillables is so small that a ban on plastic nonrefillables will not alter the volume of resources consumed for non-fuel purposes. If any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable" because its weight is continually being reduced and it is recyclable. (A. 42.)

G. Other environmental factors further demonstrate the superiority of the plastic bottle.

In the words of the Minnesota Supreme Court, "When other environmental factors are considered, the superiority of plastic nonrefillables is more evident." (A. 42 n.19.)

The system of producing the paperboard carton (1) consumes much more water, (2) generates much more waterborne waste, (3) consumes much greater quantities of raw materials, and (4) generates more industrial solid waste. (R. 158-159, 166-168; Pl. Ex. L.) These comparisons are par-

ticularly significant in Minnesota because the impacts generated by the paperboard carton are all felt within Minnesota. While the plastic bottle system creates more atmospheric emissions, these do not occur in or near Minnesota. (R. 167-168.)

II. THE ACT DENIES PLAINTIFFS EQUAL PROTECTION OF THE LAWS.

Plaintiffs agree that the appropriate test for determining the constitutionality of this unique Minnesota statute is whether the classification created by the Act is rationally related to furthering a legitimate state interest. Both the Minnesota Supreme Court and the trial court applied that standard to the facts of this case and concluded that the Act violates the Equal Protection Clause. (A. 23, 45.)

Plaintiffs acknowledge the burden that they carried in successfully challenging the constitutionality of the Act in the Minnesota courts. Statutes are presumptively constitutional, and judges do not determine the wisdom of legislative acts. But the presumption of constitutionality is nothing more than a presumption "of the existence of factual conditions supporting the legislation" and is therefore rebuttable. *Borden's Farm Products Co., Inc. v. Baldwin, supra,* note 10, 293 U.S. at 209. Like all civil presumptions, it is procedural and vanishes when credible rebutting evidence is received. Fed. R. Evid. 301; Minn. R. Evid. 301 (identical counterpart to federal rule).

A. The purpose of the Act is not a legitimate one.

This Court has held that "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld,* 420 U.S. 636,

648 (1975). In a footnote to this statement, the Court further observed:

> This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.

Id. at 648 n.16. This principle is no less applicable when the "benign, compensatory purpose" is purportedly environmental:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.

Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207, 1217-1218 (1972) (dictum) (Burger, C. J., sitting as circuit judge).

As discussed in detail below at pages 30-31, the legislative history demonstrates, and the trial court found, that the Act's "actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." (A. 22.) This legislative purpose does not constitute a legitimate state interest. Consequently the Act violates the Equal Protection Clause whether or not the means chosen would further the actual legislative goal.

B. Even if the purpose of the Act were among the purposes stated in its preamble, the classification contained in the Act is not rationally related to furthering any stated purpose.

Plaintiffs agree that the purposes of the Act as asserted in its preamble represent legitimate state purposes. However, plaintiffs' evidence convinced the Minnesota courts that no credible facts exist to distinguish the paperboard container from the plastic in such a way that their differing treatment under the Act furthers any of those purposes.

In one of the most recent decisions in which the Court applied the standard of rationality, the burden of those challenging the legislative enactment was described as follows:

> [They] must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Vance v. Bradley, 440 U.S. 93, 111 (1979). Plaintiffs introduced voluminous evidence and successfully met this substantial burden.

The Minnesota Attorney General and supporting *amici* would impose an impossible burden of proof on plaintiffs: they apply a standard requiring the introduction of evidence but would preclude courts from considering it. The trial court and the Minnesota Supreme Court carefully considered the evidence of record. Contrary to the contention of the Minnesota Attorney General, the Minnesota Supreme Court's consideration of the facts was proper and required.[16]

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[16] The Minnesota Attorney General suggests that the court may search its own mind in preference to the record for facts upon which the legislature might conceivably have based its classifica-

It is not disputed that the appropriate standard of judicial review is a limited one. The Minnesota Attorney General observes that in the last 50 years the Court has invalidated only one economic regulation as violative of equal protection and that its decision in that one case was subsequently overruled. (Pet. Brief p. 28.) That observation ignores the "noneconomic" regulations which have been invalidated under the very same standard. In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), for example, the Court invalidated a New Jersey statute requiring that the cost of trial transcripts be deducted from the earnings of imprisoned indigent defendants as not rationally related to the state's fiscal objective. Recently the Court summarily affirmed a decision of the Eighth Circuit which held there was no rational basis for a statutory classification which denied pre-pregnancy family planning funds to nonprofit corporations which perform abortions, other than hospitals or health maintenance organizations. *Minnesota v. Planned Parenthood of Minnesota*, 48 U.S.L.W. 3846 (June 24, 1980).

The fact remains that the Court continues to employ the rational basis standard in its review of economic and noneconomic regulations. It has never held that any regulation containing a legislative statement of purpose and accompanied by a few substantiating facts will stand. To legitimate such legislative action automatically would indeed be to act as a

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tion, citing McGowan v. Maryland, 366 U.S. 420 (1961). (Pet. Brief pp. 27, 33.) One commentator has noted that although *McGowan* is still relied upon occasionally as authority for ignoring the record, the Court has increasingly shown a willingness to consider the evidence which the parties have introduced. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049, 1058 (1979). "[I]f extra-record facts necessarily play a role in what judges determine to be 'reasonably conceivable,' it would be anomolous to exclude facts of record in making that judgment. It would be no less anomolous that facts delimiting what was conceivable were not proved because they were not permitted to be proved." *Id.*

super-legislature. The rational basis standard continues to act as a limit on legislative action, not merely as a foregone conclusion of approval.

The State acknowledges that a statute will fail to satisfy the rational basis standard when the legislative facts upon which it is based are demonstrably false. (Pet. Brief p. 33.) Futhermore, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). The facts introduced by plaintiffs and discussed in Section I convinced the Minnesota courts not simply that the facts are debatable but that the facts upon which the legislature allegedly relied (e.g., that the paperboard container occupies less space in a landfill) were demonstrably false. Therefore, they cannot form a rational basis for the classification contained in the Act. The credible facts demonstrate that the ban on the sale of milk in plastic bottles cannot reasonably be perceived to promote the use of refillable milk containers, ameliorate solid waste management problems or conserve either energy or natural resources.

The Minnesota Attorney General, citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), asserts that a legislature may act to ameliorate an existing evil one step at a time. Plaintiffs agree. Likewise, the Minnesota Supreme Court explicitly acknowledged this principle in its opinion. It held, however, that the Act did not represent a step toward amelioration of any existing or perceived evil. (A. 45.)

The *Dukes* case is in obvious contrast to the case at bar. There the legislative body had determined that pushcart vendors, because incompatible with the appearance and custom of the French Quarter, were an evil which it wished to eradicate. By prohibiting all vendors but those which had operated

within the Quarter for at least eight years, the ordinance eliminated all but two vendors, a substantial decrease in the perceived evil. Furthermore, with the passage of time and the death of the two vendors, or their cessation of business for other reasons, the perceived evil would be eliminated altogether. Similarly, the steps upheld in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) at least caused a reduction in the quantity and magnitude of the perceived "evil."

In the instant case, however, the statute will do the reverse by legislating total market domination by an environmentally inferior container. Market conditions, consumer preferences, and the failure of the legislature to take any additional steps dictate that paperboard will replace plastic throughout the state. A step was taken by the Minnesota legislature, but it was backward rather than forward.

III. THE ACT IMPOSES UNCONSTITUTIONAL BURDENS ON INTERSTATE COMMERCE.

The Act's burdens on interstate commerce are substantial. The most obvious and severe are those which affect the plastics industry. No natural gas or oil is extracted in Minnesota. None of the refineries producing high-density polyethylene is located in Minnesota. (R. 309.) The machinery used to mold the containers is manufactured outside Minnesota. (R. 242, 244.) Moreover, this is not a situation where marketing in the state is merely made more expensive or difficult; the movement of this raw material and equipment is halted at the Minnesota border. The container is not regulated, it is banned. Meanwhile, Minnesota timber and paper industries are unaffected.

Plaintiff Phillips Petroleum Company would lose between $400,000 and $500,000 annually from the sale of plastic resin to Minnesota customers which mold nonrefillable plastic milk bottles. (R. 309.) Other members of plaintiff The Society of the Plastics Industry, Inc. engaged in the production of resin would be similarly affected. Plaintiff Hoover, the major manufacturer of blow-molding machinery in the United States (R. 244), has already lost $1.5 million in sales in Minnesota because of the pendency or passage of the Act. (R. 247, 254.)

The Act also burdens the operations of dairies with multistate markets. Wells Dairy, Inc., an Iowa dairy which annually sells one million gallons of milk in Minnesota in plastic bottles, would have to reinstitute paper packaging for the milk it ships to Minnesota. Like Wells, Minnesota dairies such as Marigold (56 percent of whose sales are outside Minnesota (R. 46)) and Clover Leaf would be forced to employ two container distribution systems in order to continue to compete in both Minnesota and other states. This would increase their costs of doing business and decrease their already slight profit margins. (R. 346, 427-428.)

Plaintiff M-H Packaging, located in Minnesota, manufactures nonrefillable plastic bottles. Most of its sales are to dairies, many of which are outside Minnesota. (R. 283-284.) The Act would eliminate one-third of its business. (R. 289-290.)

Dairy farmers would also be affected. Those located in other states who seek to market their milk in Minnesota would be deprived of the advantages which the container gives to milk in its competition with other beverages. (R. 455-457.) Minnesota dairy farmers selling to Minnesota dairies which do business in other states would indirectly suffer the same competitive disadvantages encountered by those dairies.

Thus the interstate movement of plastic, machinery, containers and milk, as well as the ability to engage in the business of selling any of these products on a multi-state basis, would be substantially impaired by the statute.

Philadelphia v. New Jersey, 437 U.S. 617 (1978) and *Lewis v. BT Investment Managers, Inc.*, 100 S.Ct. 2009 (1980) articulate the two components of Commerce Clause analysis applicable to this case. The first, a "virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra*, 437 U.S. at 624, is applied to statutes which effect economic protectionism. The second, a more flexible balancing of burdens and benefits, is applied to statutes which do not necessarily have this objective or impact. The application of either rule compels the conclusion that the Act contravenes the Commerce Clause.

A. The Act is invalid as a tool of economic protectionism.

The Court has long recognized the evils of economic isolation and protectionism among the states. The promotion of local economic interests is not legitimate when effected by discrimination against interstate commerce. *E.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Philadelphia v. New Jersey, supra; Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). "The clearest example of [economic protectionism subject to virtually *per se* invalidity] is a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624.

Occasionally, as in this case, discriminatory motives are apparent in legislative history. *See Lewis v. BT Investment Managers Inc., supra*, 100 S.Ct. at 2013; *Hunt v. Washington*

State Apple Advertising Commission, supra, 432 U.S. at 352. The legislative debates show that the Act is couched in laudable terms but founded in discrimination against out-of-state interests.

Once the alleged bases for the bill were challenged by the sponsors' skeptical legislative colleagues, the true purpose of the bill was disclosed. Representative Munger, the chief sponsor in the House of Representatives, admitted that he had not evaluated the environmental issues posed by the bill, recounting instead the evils of the out-of-state plastics industry and the need to protect Minnesota businesses. (R. 119-121.) Recurring themes in the debates included the protection of the Minnesota timber and pulp industry (R. 115, 122, 125) and of the small dairies which would allegedly be unable to compete with the larger ones (i.e., those selling milk in other states). (R. 114-115, 119, 121.) The bill was repeatedly characterized as economic rather than environmental in purpose. (R. 121-122, 124, 129-130.)

Representative Munger expressed particular hostility toward out-of-state interests, chiding a colleague for letting "the guys in the alligator shoes from New York and Chicago come here and tell you how to run your business." (R. 118.) He added:

> I don't think we need to have anybody from New York and the plastics industry to come in here and tell us farmers how to farm. We don't need anyone to come in here to farm the farmer.

(Pl. Ex. J., House debate Mar. 17, 1977, p. 2; R. 112-113.)

Senator Ulland, a supporter of the bill from Duluth, agreed:

> I don't think there is anything the matter with supporting the timber industry which is our third largest employer in the state. I think in fact that is one of our responsi-

> bilities to keep a healthy economy in the state rather than importing petrochemicals and importing plastic bottles from Chicago or wherever they are manufactured certainly the natural resources aren't from here. I am a little bit surprised at Senator Peterson who has a significant number of pulp cutters in his district, would not be terribly concerned with one of their major products.

(Pl. Ex. J., Senate debate May 20, 1977, p. 4; R. 112-113.)

That efforts in Minnesota to adopt container deposit legislation had failed repeatedly suggests that a token act was needed that would appease environmentalist criticism of the legislature without generating opposition from Minnesota business and labor interests. (R. 131-132, 629-630.)

The trial court found that the Act's "actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." (A. 22.)

The Court need not, however, find a protectionist motive in order to invalidate the statute as a protectionist measure. "The principal focus of inquiry must be the practical operation of the statute." *Lewis v. BT Investment Managers, supra*, 100 S.Ct. at 2016. A legitimate local purpose will not save a statute whose effects are discriminatory, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey, supra*, 437 U.S. at 626. A different view would render the Commerce Clause meaningless, "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison, supra*, 340 U.S. at 354.

Thus even if the real purposes of the Act were to alleviate solid waste problems, conserve natural resources and save

energy, it is invalid because it discriminates against interstate commerce in selecting the means to achieve those ends. The out-of-state plastics industry was chosen to bear the burden, and the only Minnesota enterprises affected were those deriving a major portion of their business from interstate commerce.[17]

If the Act's discriminatory purposes and effects do not alone render it invalid, they at least place on the State the burden of demonstrating that there are local benefits derived from the Act and that no reasonable nondiscriminatory alternatives exist. *Hunt v. Washington State Apple Advertising Commission, supra,* 432 U.S. at 353. This burden the State has not met.

As discussed in detail in section I, the purported benefits of the Act are illusory. The Act will aggravate, not ameliorate, solid waste problems. It will not revive returnable milk bottles. It will not conserve energy or natural resources.

Moreover, there is a variety of nondiscriminatory alternatives. The most obvious is to ban both the paper carton and the plastic container. The Minnesota Attorney General argues

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[17] *Philadelphia* and *Hughes,* along with West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) and Pennsylvania v. West Virginia, 262 U.S. 553 (1923), make it clear that a desire to protect the environment or conserve natural resources provides no basis for the erosion of established Commerce Clause criteria. As a solid waste measure, for example, the Act must fall because it "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." Philadelphia v. New Jersey, *supra,* 437 U.S. at 628.

Decisions upholding actions with resource-related objectives are easily distinguished. Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179 (1950), upheld an order which merely regulated gas prices. In Reeves, Inc. v. Stake, 48 U.S.L.W. 4746 (June 17, 1980) the state acted in its proprietary capacity as a market participant. In Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), the statute regulated only the ownership of gasoline stations and would not alter the relative market shares of local and out-of-state goods.

that this would create too much disruption. This argument highlights the expediency of discriminatory legislation; it is easy for legislators to choose remedies which do not create burdens for their constituents. *See* L. Tribe, *American Constitutional Law*, §§6-1, 6-5 (1978).

The legislature could also impose deposit requirements on both containers, ban any container which cannot be recycled, create requirements or incentives for recycling programs or provide incentives for the use of refillables. Still another approach would be a comprehensive program for reviewing all new forms of packaging, which is in fact the purpose of Minnesota's Package Review Act (Minn. Stat. §116F.06). This statute, which gives the Minnesota Pollution Control Agency extensive powers to review new packages and containers, was upheld by the Minnesota Supreme Court on the same day that the instant case was decided. *Can Manufacturers Institute, Inc. v. Minnesota, supra.* See *Plastic Bans, Bottle Bills and Comprehensive Container Legislation: Packaging Laws Get Mixed Reviews in State Courts*, 9 Environmental Law Reporter 10193 (Nov. 1979).

These alternatives are not perfect solutions. They would impose local burdens and may therefore be unpopular and difficult to pass. Some of them might impose even greater burdens on interstate commerce than the present statute. The important distinction, however, is that each would create real local benefits, and none would discriminate in this manner against interstate commerce. And the alternatives need not be perfect. Their imperfection is the "type of [imperfection] that the national interest in the free flow of goods between the states demands be tolerated." *Hunt v. Washington State Apple Advertising Commission, supra*, 432 U.S. at 354.

Finally, it must be noted that, to the extent that the Minnesota legislature may have intended to conserve energy, it has chosen a means which the Commerce Clause has reserved to the Congress. To be sure, Congress has solicited the cooperation of the states in addressing energy and environmental problems. But none of the federal statutes cited by the Solicitor General (Brief for the United States as *Amicus Curiae*, pp. 2-4) encourages the states to save energy by banning each other's products. Minnesota is at best attempting to dictate the economic and environmental policies of the gas- and oil-producing states. Those states must supply their own remedies. "One state may not put pressure of that sort upon others to reform their economic [or environmental] standards," *Baldwin v. G.A.F. Seelig, Inc., supra*, 294 U.S. at 524, or "force its own judgments" on such matters on other states "at the pain of an absolute ban on the interstate flow of commerce." *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell, supra*, 424 U.S. at 380.

Our oil and gas are "of profound national importance." *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978). It is precisely for this reason that if judgments are to be made about the uses which may be made of these resources, they should be made by Congress, not by the legislators of individual states whose constituents are not affected by their actions.

> It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.

H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 543 (1949).[18]

Chaos would result if every state were permitted to dictate the manner in which important natural resources found in other states or within its own boundaries may be used.

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!

Id. at 538-539.[19]

If this statute is upheld, then another state may ban the sale of nylon stockings, another may outlaw acrylic carpeting,

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[18] The unique function of the judiciary is thus particularly important in commerce cases. The judiciary plays an important role in assessing the validity of interstate commerce regulation by the states, because it may be the branch of government most able to provide a check against excessive local assumption of power. When a state legislature determines how much power it has to affect interstate commerce, there may be no inner political check on its action. The incentive to shift burdens to out-of-state interests to which local politicians need not be responsive may be sufficiently great to warrant closer examination of state enactments in the commerce area than of state laws which affect only the local population. When Congress has failed to respond to such shifts by enacting remedial legislation, the concept of the dormant commerce power allows the judiciary to arbitrate the competing state and federal interstate interests. Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762, 1777-1778 (1974).

[19] It is no answer that Minnesota is not hoarding its own resources but limiting its consumption of the resources of other states.

> It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Philadelphia v. New Jersey, *supra*, 437 U.S. at 628.

while still another, asserting a shortage of wood,[20] may retaliate by banning wood furniture and cardboard boxes. "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals," with the result that "embargo may be retaliated by embargo, and commerce will be halted at state lines." *West v. Kansas Natural Gas Co., supra,* note 17, 221 U.S. at 255. "[T]he door [will have] been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 522. In the words of Mr. Justice Cardozo:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division.

Id. at 523.

B. The Act imposes burdens on interstate commerce that outweigh its putative benefits.

Even if the Court does not decide that the Act discriminates or effects economic protectionism, the Act must fall under the more flexible balancing test. It "cannot be justified as an incidental burden necessitated by legitimate local concerns." *Lewis v. BT Investment Managers, Inc., supra,* 100 S.Ct. at 2019.

The benefit-burden analysis applied when nondiscriminatory objectives are credibly advanced derives from *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970):

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[20] Wood and paper shortages are real phenomena. *See Wall St. J.,* July 30, 1979, at 12, col. 1 (East Coast ed.) The Minnesota Attorney General and supporting *amici* seem to suggest that, because trees are renewable, they are in infinite supply.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citations.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In weighing the putative benefits against the burdens imposed by the statute, the Court must make a "delicate adjustment of the conflicting state and federal claims." *H. P. Hood & Sons, Inc. v. DuMond, supra*, 336 U.S. at 553 (Black, J., dissenting). This requires more than a mere determination that the legislation may further a matter of legitimate state concern. The benefits must be weighed against the burdens on commerce. Even in the field of safety, where unusual deference has been given to state determinations of benefits to be achieved, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443-444 (1978), the Court has found benefits to be outweighed by burdens. *Id.; Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). The protection afforded by the Commerce Clause cannot be avoided by "simply invoking the convenient apologetics of the police power." *Id.* at 780.

Nor is it sufficient for the State merely to hypothesize the existence of local benefits. As was the case in *Lewis* and *Hunt*, if the asserted benefits do not in fact exist, i.e., if it is not likely that the statute will achieve its asserted purposes, then the statute will fall. Furthermore, even if a legitimate local

interest will be served by the statute, it will not be sustained if "there are means adequate to serve this interest that are substantially less burdensome on commerce." *Great Atlantic and Pacific Co., Inc. v. Cottrell, supra,* 424 U.S. at 376-377.

As already discussed, the benefits of the Act are illusory; its asserted purposes will not be achieved. Effective, less burdensome alternative means to attain the purported objectives do exist. And the burdens on commerce are substantial. Under these circumstances the Act cannot withstand constitutional challenge.

CONCLUSION

The recitation of undisputed constitutional standards will not resolve this case. Its resolution turns instead on the application of those standards to the facts.

The Minnesota Attorney General equates rationality analysis with legislative infallibility. The Constitution, however, imposes limits on legislative action, and those limits have been reached in this case.

Contrary to the assertions of the Minnesota Attorney General, this Court's affirmance of the Minnesota decision will not preclude a legislature from taking a step-by-step approach to environmental problems. The legislature's power to do so is undisputed. The holding in this case is limited to its facts, which show no such step taken, no credible basis upon which to believe that the classification contained in the Act will further its alleged purposes, and a political setting in which the out-of-state plastics industry was easily sacrificed to local industries and environmental proclamations.

Plaintiffs respectfully request the Court to affirm the decision of the Minnesota Supreme Court that the Act violates the

Equal Protection Clause of the Fourteenth Amendment or, alternatively, to affirm that decision on the ground that the Act contravenes the Commerce Clause.

Respectfully submitted,

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No. 79-1171

IN THE

Supreme Court of the United States

October Term, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

The brief for plaintiffs-respondents (hereinafter "the plaintiffs") has raised an argument which was neither considered by the Minnesota Supreme Court nor addressed in the State's brief: the argument that banning throwaway plastic milk bottles discriminates against, or unduly burdens, interstate commerce.[1] This reply brief is submitted in response to this new argument. The State adheres to the equal protection and due process arguments advanced in its earlier brief, and the absence from this reply brief of point-by-point corrections of the inaccuracies and extra-record factual assertions which permeate the briefs of plaintiffs and their supporting *amici curiae*[2] should not be construed as acquiescence in their misstatements.

---

[1] While the trial court concluded that the Act, Minnesota Laws of 1977, Chapter 268, unreasonably burdened interstate commerce, (A.23), the Minnesota Supreme Court stated that "because of our decision on equal protection grounds, we do not consider that issue." (A.45, n. 20.)

[2] *See, e.g.*, Brief of Minnesota Dairies Federation, *Amicus Curiae*, (hereinafter Dairies Brief) at 8, which argues almost entirely from factual assertions not contained in the record, and Respondents' Brief at 19, 36, citing back issues of the *Wall Street Journal*.

ARGUMENT

THE ACT DOES NOT CONSTITUTE AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

U.S. Const. art. I, §8, cl. 3, provides:

> The Congress shall have power:
>
> . . . .
>
> To regulate commerce . . . among the several states, ...

This provision has been interpreted to protect a national interest in the free passing of commerce among the several states and to prevent individual states from interfering with that national interest.

This commerce clause is not, however, designed to shield any particular product from legitimate local regulation simply because it may have moved in commerce, or any particular manner of doing business simply because it is conducted in more than one state. On the contrary, the opinions of this Court recognize that incidental burdens on interstate commerce are unavoidable when a State legislates to safeguard the welfare of its people. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 (1938). *See also, Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Thus, a state statute is not to be struck down solely because it has impacts upon businesses involved in interstate transactions. Rather, to be rendered invalid, a local regulation must materially subvert the national interest in maintaining free trade among the states.

The Act in question here, Minn. Laws of 1977, Chapter 268, (hereinafter "the Act"), does one simple and direct thing—it prohibits the sale of milk in throwaway plastic containers *at retail in Minnesota*. That prohibition is in no way dependent upon where the milk is produced or bottled. Nor is it dependent upon the place of origin of the bottles, their components or any associated equipment.

Contrary to the assertions of plaintiffs, the Act in no way halts the passage of any goods at the Minnesota border. Milk in plastic containers may freely flow into, through and out of Minnesota without hindrance. Likewise, all forms of machinery, resins and any other substance may freely be imported, exported and sold in Minnesota without any legal impediment from the Act, regardless of their place of origin. The Act is not a protectionist measure for the benefit of local interests at the expense of out-of-state interests, nor are the burdens, if any, on commerce, out of proportion to the legitimate local concerns addressed.

I. THE ACT IS NOT VOID AS PROTECTIONIST LEGISLATION.

Plaintiffs attempt to impugn the Act as protectionist on the basis of two or three isolated statements made in the course of the lengthy legislative debates, the typed transcription of which covers more than forty-five single-spaced pages. The only reliable way to determine the nature of the legislative debate is to review the entirety of that transcription, admitted into evidence as Plaintiffs' Exhibit J; the State is confident that such a review will strongly persuade the Court that the Act reflects sincere and legitimate environmental purposes.

As the debates show, a broad range of concerns entered the minds of individual legislators in voting on the bill, as is true of all legislation. It is for just this reason that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *United States v. O'Brien,* 391 U.S. 367, 382 (1968). As this Court explained:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance . . . . It is entirely another matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void, essentially on the ground that it is unwise, legislation which Congress had the undoubted power to enact and which could have been reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

United States v. O'Brien, supra, 391 U.S. at 383, 384.

As is suggested by the excerpts quoted in the State's prior brief, at pages 8-16, the legislative debates in their full context demonstrate the environmental purposes of the Act. References to the plastic industry, and to economic interests, were made, as the transcription shows, in the context of arguments for excluding the environmentally bad throwaway jug before it became economically entrenched in Minnesota and before widespread reliance on it could develop, and not as a "xeno-

phobic" reaction to out-of-state interests. As has been argued previously, this is a strong reason for distinguishing between paper and plastic containers.

The Executive Director of the Minnesota Pollution Control Agency, which developed and proposed the Act, confirmed this fact, testifying that the Pollution Control Agency does not favor the use of paper cartons, and that the Act was not intended to promote their increased use, (T.637, 638), but rather to head off an impending investment by major dairies in packaging systems for the also bad throwaway plastic jug. (T.628, 629). Nor does the record indicate that the Act was supported or promoted by timber or paper interests; instead, it was supported by Minnesota's Department of Energy, Pollution Control Agency, Department of Natural Resources, and Department of Agriculture, and by the Consumer Services Division of Minnesota's Department of Commerce. (T.142).

Plaintiffs cite no case in which the statements of a small number of legislators have been held to establish that an act of neutral application is invalid as economic protectionism. Rather they cite a number of cases in which a product or service moving across state lines is subjected to a greater burden than the *same* product or service originating in-state. *E.g.*, *Lewis v. B.T. Investment Managers, Inc.*, 100 S.Ct. 2009 (1980) (local banks versus out-of-state banks); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (in-state trash versus out-of-state trash); *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977) (in-state apples versus out-of-state apples); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (in-state milk sales versus out-of-state milk sales).

This is clearly not a case where "economic protectionism" offers any guidance to judicial decision. The Court cannot compare the Act's treatment of in-state versus out-of-state, trash as in *New Jersey, supra,* or apples, as in *Hunt, supra.* It is simply not the case that retail sale of milk in throwaway plastic containers is generally equated with out-of-state interests or that the sale of milk in other containers is equated with in-state interests. Rather, the record and the very arguments of the plaintiffs and their *amici* demonstrate plainly that the so-called "burdens" of the Act are not laid upon out-of-state concerns *per se* to the benefit of in-state interests *per se.*

Plaintiffs' effort to establish protectionism from the bare assertion that the most basic raw material for throwaway plastic jugs and the machines for forming them are produced out-of-state, and from the fact that Minnesota is engaged in timber production, simplistically ignores a number of critical facts:

1. The act is not "anti-plastic", since plastic is also used in the permitted returnable bottles and plastic pouches. Even the paper containers which plaintiffs oppose are coated with polyethylene.

2. The goal of the Act is not to promote paper containers; rather, it is to stop the throwaway plastic jug, as an important step away from dependence upon wasteful throwaway packaging in general.

3. There is no evidence that either the raw materials or machinery used in producing paper containers come from Minnesota companies as opposed to out-of-state or multi-state companies. The Court can take judicial notice that the timber and paper industries are national in scope; there is no reason to assume that any paper

cartons used to package Minnesota milk will not pass in interstate commerce. Nor does the record indicate that the principal maker of paper carton machinery, Ex-Cello, (T.247, 248), is located in Minnesota; thus, such machinery can be presumed to pass in interstate commerce.

4. Local interests such as M-H Packaging Systems, Inc. (hereinafter "M-H"), Marigold Foods, Inc. (hereinafter "Marigold"), and undoubtedly numerous others, are directly involved in the distribution, fabrication and marketing of resins and making plastic jugs. The mere fact that plaintiffs' witness from Texas was personally unaware of any Minnesota polyethylene producers, (T. 309), does not demonstrate that plastic is not, or cannot be, produced and fabricated in Minnesota.

5. Most directly affected by application of the Act are local retailers and dairies who desire the convenience and added profit they believe may be gained by using the throwaway plastic jug.

When all of the potential direct and indirect impacts of the Act are taken into account, there is no basis to conclude that the Act operates to promote in-state interests in general at the expense of out-of-state interest in general. Instead, while the degree of effect on local dairies, fabricators and retailers may relate to their local or in-state character, the indirect effect on out-of-state interests such as resin producers and machinery manufacturers stems form the nature of their product, rather than the geography of their operation.

II. THE ACT CREATES NO BURDENS ON COMMERCE WHICH OUTWEIGH ITS BENEFITS.

Plaintiffs argue that even if the Act is evenhanded in its effects—as it is—it fails the balancing test described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), where this Court observed that a statute which serves a legitimate local purpose may be stricken if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Plaintiffs would have the Court use this balancing test as a guise for reinstituting the type of substantive due process review long abandoned by this Court.

As the State and *amici* have discussed at length in prior briefs, the state has a strong and proper interest in addressing the resource, energy and environmental concerns arising, *inter alia*, from the proliferation of throwaway packaging. The instant Act constitutes a modest, but appropriate, step in addressing such problems. Against this important state interest, plaintiffs pose no showing of a burden on commerce. Rather they assert an alleged general detriment to particular companies, both in and out of Minnesota, which are engaged in commerce. Plaintiffs complain that the Act will "increase their costs of doing business and decrease their already slight profit margins." (Brief for Respondents, 28). While the cost of compliance with a regulation is not, in every case, "entirely irrelevant," it is never sufficient in itself to invalidate a statute on commerce clause grounds. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 445 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526 (1959). Nor is every added cost a burden on interstate commerce. Rather, commerce clause analysis requires a more searching examination of the nature and extent of a statute's impact, to de-

termine whether it impairs the types of interests protected by the commerce clause. Under such analysis, the claims of the plaintiffs dissolve.

A. The Act Does Not Burden Interstate Commerce In Petroleum Products.

Plaintiffs complain earnestly that the Act imposes a "severe" burden on the plastics industry, and that raw material and equipment for making plastic are "halted at the Minnesota border." (Respondents' Brief 27). It is true that the Act will preclude the frivolous use of gas and oil for throwaway milk containers in Minnesota. Like every other economic regulation, the Act thus incidently curtails, or inhibits, one form of business activity. To point out that a statute has an impact, however, is to beg the question whether that impact constitutes a burden on interstate commerce, and whether any such burden is excessive.

The impact on plaintiff Phillips Petroleum Company (hereinafter "Phillips") and other petro-chemical companies is both minimal and nondiscriminatory.

It is silly to assert that non-Minnesota producers, such as Phillips, have their products "halted at the Minnesota border." Phillips and other refiners are free to ship natural gas, polyethylene resins, or plastic bottles, into, through, or out of Minnesota. Polyethylene, of course, is used for thousands of products other than milk containers. (T.308). The use and shipment of polyethylene for these other purposes is absolutely unaffected by the Act's ban on this particularly wasteful use. Even with regard to throwaway bottles, Phillips is free to ship resins to Minnesota for use in making bottles for products other than milk, and even for use by Minnesota milk

bottle producers such as M-H and Marigold, who sell milk or plastic jugs, or both, in other states. Nor is there any restriction on products passing through, or from, Minnesota for sale elsewhere.

Most importantly, the overall impact on Phillips is relatively insubstantial. Phillips is a large, multi-national petrochemical company, and strongly urges the necessity of wise use and conservation of natural gas. (T.312, 313). Yet in this litigation it vigorously opposes local elimination of this frivolous container, despite the fact that Minnesota throwaway milk containers account for less than one one-hundredth of one percent of Phillips' sales (T.322); despite the fact that demand for its polyethylene resins for other uses is expanding rapidly (T.317, 318); and despite the fact that the millions of cubic feet of natural gas used to make these frivolous containers could instead be used for heating or energy production.

B. The Act Does Not Impose An Impermissible Burden On The Plastics Industry Generally.

The Society of the Plastics Industry, Inc. (hereinafter "SPI"), the trade association of the plastics industry, complains that its members will lose sales. As has been argued previously, elimination of throwaway plastic bottles in Minnesota is likely to promote the use of the vastly preferable returnable plastic bottle or, as was the case in Ontario, the similarly superior plastic pouch. Like the throwaways, these alternative packages would be made of plastic produced and sold by SPI's members. It is perhaps understandable that plastic manufacturers might prefer to sell containers which are thrown away after a single use, rather than reusable containers which are refilled as many as 150 times

before they are discarded, but the commerce clause does not protect such preferences.

Plaintiffs' unproven claim that the Act will encourage use of paper cartons amounts to no more than an assertion that one portion of the national packaging industry may benefit at the expense of another portion of the industry. Assuming, *arguendo*, that plaintiffs' unproven claim is correct, it would nevertheless not be cognizable under the commerce clause. The commerce clause does not protect particular firms from the burdens of regulation, nor does it protect the particular structure or method of operation in a market. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). A minor realignment of the packaging market, benefiting one element of the industry relative to another, is a matter of constitutional indifference.

C. The Act Does Not Impose An Unconstitutional Burden On Commerce In Packaging Equipment.

The Uniloy Division of Hoover Universal, Inc. (hereinafter "Hoover"), the principal maker of the machines which make plastic milk bottles, with total annual sales of $500,000,000 (T.266), complains that the Act will cost it sales.[3] Again, this is not the type of "burden" cognizable under the commerce clause.

By encouraging the use of returnable plastic milk bottles, the Act may well generate other sales for Hoover, because

[3] If dairies were free to use throwaway plastic containers, they would have the option of buying throwaway containers from molders who have already purchased molding machinery, such as plaintiffs Marigold and M-H. It does not follow, therefore, that increased use of throwaway jugs would necessarily generate sales for Hoover. Furthermore, due to the long useful life of Hoover machines, (T.259) any sales would not be regularly recurring.

Hoover machines can be designed or adapted to make returnable bottles. (T.252, 253). Or the Act may generate interstate sales of the machinery used to make glass bottles or plastic pouches. Even if plaintiffs are correct, and the Act increases sales of paper cartons, sales may simply shift from Hoover to other non-Minnesota companies supplying paper carton machinery. Again, the question as to which of these interstate competitors receives the most business for Minnesota milk containers is of no constitutional significance whatever. *C.f. Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978).

D. The Act Does Not Unconstitutionally Burden Interstate Commerce In Containers.

Plaintiff M-H is a small Minnesota maker of throwaway plastic bottles, which it produces on a single Hoover machine. (T. 284, 285). Plaintiffs' complaint that M-H will lose sales under the Act illustrates the fallacious nature of their commerce clause arguments generally. The Act affects only the Minnesota sales of this Minnesota business. That, obviously, is not interstate commerce.

The Act does not restrict M-H in its production of plastic bottles for sale outside Minnesota, or of bottles for products other than milk. Plaintiffs apparently assert that a loss of Minnesota business[4] will reduce M-H's total volume, and thus

[4] It is not at all clear whether, or to what extent, M-H will be damaged by the Act, even in its in-state business. At the time M-H began production in 1977, its Illinois owners were aware of the then-pending ban on throwaway milk bottles, and they therefore arranged for M-H's plant to be operated under a 5-year lease arrangement allowing them to cancel the lease if throwaway plastic milk containers are banned. (T.293-295). Approximately 30 percent of M-H's business is attributable to the sale of throwaway containers for milk in Minnesota. (T.283, 284). Even if plaintiffs

reduce the profitability of its non-Minnesota sales. Plaintiffs apparently contend that these profits are constitutionally protected, and that states may not regulate even intrastate business activities, if the result is to impair overall profits. The commerce clause has never been so construed.

E. The Act Does Not Unconstitutionally Burden Interstate Sales By Local Dairies.

Plaintiffs next complain that the Act will impose added costs on Minnesota dairies Marigold and Clover Leaf Creamery Company (hereinafter "Clover Leaf"). Again, the Act does not limit or regulate the out-of-state sales of these businesses. The impact of Minnesota regulations on the Minnesota sales of these Minnesota businesses is simply not a matter of interstate commerce.

Plaintiffs strain unsuccessfully to transform the impact on these Minnesota businesses into an interstate issue, arguing that elimination of throwaway plastic containers from the Minnesota market will indirectly burden the out-of-state sales of Marigold and Clover Leaf. The roundabout argument is that, for competitive purposes, these dairies would prefer to use throwaway containers outside Minnesota, but that without Minnesota sales to help reduce their per-unit costs, it will be more expensive for them to do so.

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were to prevail in this action, M-H is likely to lose sales. If plaintiff Hoover is able to renew those machinery sales which were cancelled when the Act was passed, M-H will lose major customers accounting for approximately two-thirds of its Minnesota milk sales. (T. 299). In contrast, if the Act is upheld, M-H can modify its machines to produce reuseable plastic bottles; the only reason it has not yet done so is that its customers have not demanded returnables. (T.288). The underlying purpose of the Act, as has been previously argued, is to encourage the use of just such returnables.

Any indirect impact on such non-Minnesota sales is at best conjectural, if not totally imaginary. Marigold's Chairman admitted that, with or without a Minnesota market, Marigold would continue to sell the throwaways in other states. (T.474). These sales are unaffected by the Act. Marigold, Clover Leaf and other Minnesota dairies are free to package their out-of-state sales in any way they choose. They can make plastic throwaways exclusively for out-of-state use, as Marigold did for several years before it began selling them within Minnesota. (T.458). Alternatively, they can purchase plastic throwaways for out-of-state sales from molders such as M-H; they can sell their out-of-state milk in the standard half gallon package, the half gallon paper carton which they presently offer both in Minnesota and elsewhere; or they can market their out-of-state milk in gallon paper cartons, in plastic pouches, or in returnable bottles. In none of these cases will the Act burden interstate commerce.

F. The Act Does Not Unconstitutionally Burden Minnesota Sales By Out-Of-State Dairies.

Plaintiff Wells Dairy, Inc. (hereinafter "Wells"), an Iowa dairy, complains that it will be unable to use throwaway plastic containers for the ten percent of its sales which are made in Minnesota. The record, however, shows that forty percent of Wells' milk is already sold in containers other than the throwaway plastic jug, including both the paper half gallon and the paper gallon. (T. 419, 426, 439). This hardly supports any suggestion that Wells cannot market its milk in anything but the plastic jug.

Most importantly, Wells' witness indicated no impairment of ability to serve a Minnesota market under the Act. Rather

he testified that, if the Act is upheld, Wells will simply bottle its Minnesota milk on its presently underused paper carton machinery. (T.427, 441). Alternatively, Wells may choose an environmentally preferable course, and start up the environmentally superior plastic pouch packaging machinery at one of its dairies, machinery which Wells shut down immediately after buying the dairy in order to substitute the throwaway plastic jug. (T.444-45). In either case, the Act will not have imposed an impermissible burden on Wells' sales as an out-of-state dairy.

G. There Is No Showing Of Unconstitutional Burden On Retailers.

The only retailer offering evidence is Weber & Barlow Stores, Inc. (hereinafter "Barlow"). Barlow is a Minnesota corporation engaged in retail grocery sales including sales of milk products in Rochester, Minnesota, and elsewhere. (T.409-10). Barlow introduced no evidence that the Act would have any effect upon its business, aside from its effect on Barlow's general desire to respond to consumer preferences. (T.409-14).

Thus, the case here is totally devoid of the types of impacts which have been found, in other cases, to constitute excessive burdens on commerce. Plainly, there is no overt distinction made on the basis of the geographic origin of any goods, as in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) or the home state of a would-be competitor, as in *Lewis v. B.T. Investment Managers, Inc.*, 100 S.Ct. 2009 (1980).

There is no interference with the physical flow of commerce, as in *Raymond Motor Transportation, Inc. v. Rice*, 434

U.S. 429 (1978), and *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). Also absent is any state effort whatsoever to impose restrictions upon goods leaving the state. *C.f. Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Nor are interstate businesses subjected to multiple and contradictory requirements by several states.

There is not even the sort of indirect, circumstantial discrimination against a particular state's products *per se*, and in favor of a local version of the same product, which characterized the unique case of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), upon which plaintiffs place heavy reliance. In that case, a North Carolina statute conflicted with a mandatory Washington apple grading system which was concededly superior to all others, and which provided Washington apple growers with a unique and justified competitive advantage. Application of the act, which precluded the use of all state grading, removed that competitive threat to local growers of the *same product*, and placed the costly burdens of changing marketing practices upon Washington growers as such, without requiring any comparable changes for local growers. Significantly, the Court's holding was limited to the unique situation of the mandatory, superior Washington apple grades.

The question before the Court closely resembles that in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935), in which this Court upheld Oregon administrative regulations prescribing in detail the capacity, dimensions and configuration of containers for the sale of berries. There, the plaintiff, a California maker of containers not authorized by the regulations, complained that interstate commerce was unduly burdened. This Court disagreed, pointing out that the regulation

applied equally to containers of in-state and out-of-state origin, that plaintiff was free to sell its containers in Oregon for other uses, and that to sustain the plaintiff's argument would have been "to hold that its containers, because of their origin, are entitled to immunity from the exercise of the state regulatory power." *Id.*, 296 U.S. at 184.

Also noticeably lacking in this case is any suggestion that the State's admittedly legitimate goals might be advanced by means which impose fewer burdens upon the flow of commerce. Even plaintiffs candidly admit[5] that alternative means of discouraging or eliminating unnecessarily wasteful throwaway packaging will involve the same or greater burdens upon all of the plaintiffs. Indeed, such packaging cannot be reduced or eliminated without imposing the types of impacts which plaintiffs attack here as "burdens on commerce".

What plaintiffs style as the "most obvious" alternative (*i.e.*, an immediate and simultaneous ban on both plastic and paper throwaways) would relieve no burdens on any of the complaining parties, but would instead be ruinous to in-state and out-of-state dairies alike, who would have no immediate fall-back container for Minnesota sales.

When viewed in its entirety, plaintiffs' commerce clause argument is simply a cleverly disguised invitation for the Court to resurrect substantive due process under another name. They point to no interference with interstate commerce *per se*. Rather they urge that because the Act may work an economic disadvantage on certain businesses which are involved in interstate commerce, the Court should either void the Act outright under the commerce clause, or attempt to weigh the wisdom and efficacy of the Act as against plain-

[5] Respondents' Brief at 32-33.

tiffs' desire to make more sales, and to reduce overall costs.[6]

In this regard, plaintiffs' "balancing" argument closely resembles an argument advanced by the plaintiffs in *Proctor and Gamble Company v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975), *cert. den.*, 412 U.S. 978 (1975). There, plaintiff Proctor and Gamble attacked a Chicago ban on the sale of phosphate detergents, arguing that the added cost of marketing a separate line of detergent for Chicago would burden interstate commerce, just as the instant plaintiffs argue that the Act will force them to use different containers for Minnesota and non-Minnesota sales. The Court of Appeals rejected this contention and correctly recognized Proctor and Gamble's arguments as substantive due process claims under another name, holding:

> Another argument presented by plaintiffs is that the ordinance burdens interstate commerce because it amounts to an embargo on a safe, useful, and unique product of commerce without any corresponding local benefit. We find no merit to this argument. In essence, it is not a Commerce Clause argument but one based on substantive due process, an issue not before us. The only Commerce Clause cases cited for this proposition involve situations in which a state has attempted to achieve a local purpose by discriminating against out-of-state producers or manufacturers. There is no discrimination in this case. The ordinance does not require that detergents be manufactured in Chicago or Illinois and does not benefit manufacturers who are located there.

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[6] This Court has expressly held that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Governor of Maryland, supra, 437 U.S. at 127.

Id., 509 F.2d at 77-78. The Act before this Court, like the ordinance in the *Proctor and Gamble* case, imposes no burden on interstate commerce *as such*, and should not be set aside on the basis of what are, in essence, substantive due process arguments.

It is almost impossible to conceive of any police power regulation which does not affect some business which is located out of state or which engages in interstate commerce. Therefore, if plaintiffs' arguments are adopted, the commerce clause would require courts to undertake the legislative function of balancing public benefits against the added costs to private businesses with respect to every piece of legislation.

CONCLUSION

The Act does not burden interstate commerce as such. Its indirect effects on commerce are minimal, and are imposed evenhandedly on local and out-of-state interests. Plaintiffs' substantive due process arguments, whether advanced under the guise of equal protection, due process or the commerce clause, should be rejected by this Court.

For all the preceding reasons, and for the reasons stated in Petitioner's previous brief, the State of Minnesota respectfully requests that the Court reverse the decision of the Minnesota Supreme Court and affirm the Act in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN SUPPORT OF RESPONDENTS AS AMICUS CURIAE, ON BEHALF OF CAN MANUFACTURERS INSTITUTE, GLASS PACKAGING INSTITUTE, FLEXIBLE PACKAGING ASSOCIATION, COMPOSITE CAN AND TUBE INSTITUTE, AND MILK INDUSTRY FOUNDATION

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INTEREST OF AMICI

This *amicus curiae* brief is filed under Rule 36.2 of the Rules of this Court, with written consent of all the parties to the case.

Amici here comprise the following organizations: (1) the Can Manufacturers Institute, Washington, D. C., the national trade association of metal and composite can manufacturers, representing 57 can manufacturer members accounting for 85% of the metal cans produced annually in the United States; (2) the Glass Packaging Institute, Washington, D. C., the national trade association of the glass container manufacturing industry, representing 80% of the glass containers manufactured annually in the United States, or 320,763,000 gross of containers; (3) the Flexible Packaging Association, Cleveland, Ohio, a trade association representing manufacturers of flexible packaging products constructed of paper, aluminum foil, plastic film, or a combination of such materials; (4) the Composite Can and Tube Institute, Washington, D. C., a trade association representing manufacturers of composite cans, tubes, cores, ribbon blocks, cones, bobbins, mailing packages, spools and related products; and (5) the Milk Industry Foundation, Washington, D. C., a trade association representing processors, manufacturers, and distributors of fluid milk and fluid milk products.

The Minnesota statute here at issue, which makes it a crime to sell milk in nonreturnable, nonrefillable plastic containers, violates the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3. By this embargo, the State of Minnesota arbitrarily and intentionally seeks to discriminate against interstate commerce in a safe, useful and environmentally sound product. These *amici* who manufacture packaging have cause to be concerned that other packaging will be banned next by Minnesota or any other State, without a rational basis. Minnesota's ban disregards the fundamental purpose of the Commerce Clause: to ensure that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every Market in the nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties and regulations exclude them." *H. P.*

Hood & Sons v. *Du Mond, Inc.*, 336 U. S. 525, 539 (1949). Packaging manufacturers are entitled to no less a guarantee.

The Minnesota District Court, after trial, held that the statute deprived plaintiffs of equal protection of the law and constituted an unreasonable burden upon interstate commerce, in violation of the United States Constitution. The Minnesota Supreme Court, in affirming, declared the statute violative of the equal protection clause of the fourteenth amendment, holding that it was not rationally related to a legitimate state interest, and in any case would not achieve the State's desired objective. Pet. App. at A-32, 35.*

Amici, arguing herein for affirmance of the state courts' decisions, choose to emphasize the Commerce Clause ground because the basic right to an untrammeled nationwide commerce in packaging affects them directly. In addition, *amici* believe the Minnesota statute will have a severe practical effect on them, causing serious economic consequences to the container industry. This ban, moreover, will have negative impacts well beyond the borders of the State of Minnesota, because lines of industry do not track those of geography.

Amici represent a wide variety of businesses which operate nationwide, producing and distributing packaging for various products, from metal cans and glass bottles to flexible and composite packaging. Although some of this packaging (such as glass bottles) in theory may reap an economic benefit from the Minnesota statute, any short term gain is totally outweighed by the destructive nature of a protectionist embargo on interstate commerce. The Milk Industry Foundation represents processors and distributors of fluid milk, the beverage arbitrarily singled out by the Minnesota statute; in addition, it numbers as associate members producers of ingredients, equipment, and other goods and services involved in milk processing, including manufacturers of packaging materials and equipment. The mem-

* "Pet. App." refers to the Petitioner State of Minnesota's Appendix filed in this Court, "Pet. Brief" to its Brief.

bers of these five organizations engage in billions of dollars worth of business annually, which now moves freely across state lines.

SUMMARY OF ARGUMENT

The Minnesota statute making it a crime to sell milk at retail in nonreturnable plastic containers is *per se* violative of the Commerce Clause. Though labeled an environmental measure, the ban on plastic milk containers in design and effect protects local economic interests, at the expense of embargoing interstate commerce in a safe and useful package.

The Minnesota legislators have deliberately chosen to bestow important competitive advantages on some local dairies and on the in-state pulpwood industry, to the detriment of the out-of-state plastics and packaging industry that produces the banned bottles. The adverse impact on the flow of goods in interstate commerce will be disproportionate, in regard to both the packaging industry and the milk industry.

The legislative history of the Minnesota enactment demonstrates conclusively that it was designed to protect private in-state economic interests from out-of-state competition. In addition, the statute as applied will inevitably result in the promotion of Minnesota economic interests at the cost of imposing an impermissible burden on interstate commerce, similar to the burden deemed unconstitutional in an unbroken line of cases striking down state attempts to build barriers against access to in-state markets by out-of-state sellers and buyers.

The severe impact on those who manufacture the packaging and related products ultimately serving the Minnesota milk market, the majority of which are interstate businesses, is not an incidental burden on commerce justified by legitimate state concerns. The environmental rationale invoked by the State

to bolster the statute cannot withstand the holding of both the Minnesota District Court after a trial and the State Supreme Court that the State's purported interest was in no way advanced by the plastic milk container ban. Nor can Minnesota argue under applicable precedent that the "environmental" label and the "local" nature of the dairy industry call for a less stringent review of this legislation under Commerce Clause standards.

The Minnesota statute must fall as an economically protectionist measure which, both in design and in effect, is contrary to the fundamental principle established in Commerce Clause cases: that "one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935).

ARGUMENT.

I.

THE MINNESOTA BAN OF PLASTIC MILK BOTTLES IS PER SE INVALID ECONOMIC PROTECTIONISM

Recent decisions of this Court have reaffirmed the principle that state regulations of interstate commerce will be measured against the Commerce Clause based upon the actual or intended effects of the regulation. If "simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity" is applied. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2015 (1980).* If, however, the legislation "visits its effects equally upon both interstate and local business," then a balancing of the burden on commerce against the putative benefits involved is necessary. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

The Minnesota statute cannot survive Commerce Clause scrutiny under either test. But since this statute is demonstrably invalid as bare economic protectionism of certain in-state industries, this Court need not engage in the delicate process of balancing the benefits against the burdens. Here, in-state

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* *Per se* invalid legislation includes that which captures and holds employment and business that otherwise might go to other states, *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928); overtly prevents foreign enterprises from competing in local markets, *Lewis* v. *BT Investment Managers, supra;* isolates the state from a common problem by erecting a barrier to interstate trade, *Philadelphia* v. *New Jersey, supra;* or excludes an imported product in order to protect an in-state industry from out-of-state competition, *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361 (1964).

industry is the only beneficiary of this statute. The nationwide packaging industry shoulders the burden. The citizens of Minnesota and their environment will not benefit.

Because the *per se* test is so stringent, any challenge to state regulation under the Commerce Clause will naturally attempt to come within its aegis. In this instance, however, respondents have demonstrated to the Minnesota State courts and can show this Court that the Minnesota statute was an economic protectionist measure from its very inception, and that the after-the-fact rationalizations resurrected in its defense by counsel ring hollow.

Not only does the legislative history demonstrate that the statute was designed with an impermissible parochial motive, but the effect of the statute is to insulate certain in-state interests from the uncertain, but constitutionally protected, vagaries of a national market. As this Court has aptly pointed out, "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia* v. *New Jersey*, 437 U. S. at 626. The result of Minnesota's misguided effort is an adverse impact on interstate commerce with no concomitant environmental benefit to the state whatever.

A. The Legislation Is Hostile in Concept and Design to an Interstate Market

The legislative history supporting the challenged enactment contributes to an understanding of the legislature's purpose, aiding in interpreting and predicting consequences of the legislation.* Thus, in two recent decisions invalidating similarly parochial legislation, this Court specifically noted the impetus supplied for passage by the in-state protected class. In *Lewis*

* *Philadelphia* v. *New Jersey*, 437 U. S. at 626. *See also* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762 (1974), discussing the principle that an impermissible purpose behind a state enactment (whether explicit or implicit) contributes to its invalidity.

v. *BT Investment Managers, supra,* the Florida statute was amended to exclude out-of-state investment firms in "direct response" to the pending application of an outside trust company to enter the Florida market, which amendment "had the strong backing of the local financial community." 100 S. Ct. at 2013. And in *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333 (1977), the protected class of in-state apple producers was deemed "mainly responsible for this legislation being passed." *Id.* at 352.

Here, the legislative history supporting this statute demonstrates that the statute was designed as protectionist legislation. The Minnesota Supreme Court found that the statute was intended to "isolate from interstate competition the interests of certain segments of the local dairy and pulp wood industries." Finding No. 23.* The Minnesota District Court similarly held:

> ". . . the actual basis [of the legislation] was to promote the economic interests of certain segments of the local dairy and pulp wood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." Finding No. 12, Pet. App. at A-19

A protectionist motive—"to protect private economic interests in the state from the forces of the interstate market"**—is the only consistent interpretation that can be derived from the statements of the sponsors of this measure in the Minnesota legislature. These statements intone two themes: the bill was designed to shelter the smaller dairies in Minnesota from conversion to plastic containers to meet market demand, and at the same time maintain the revenues of the Minnesota wood fiber industry. Hostility toward the plastics industry, viewed an out-of-state interloper, was evident in the legislature.

Supporters of the legislation believed it was necessary because plastic containers, in the words of the bill's chief sponsor in

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* Pet. App. at A-31.

** *Reeves, Inc.* v. *Stake,* 48 U. S. L. W. 4746, 4751 n. 1 (1980) (Powell, J., dissenting).

the Minnesota Senate, would "require a major capital investment on the part of the dairies. This creates a hardship on the small dairies of our state." Pet. Brief at 10.* Similarly, Rep. Willard Munger, the bill's chief sponsor in the House and one of its authors, feared that plastic bottles would place the "small independent dairies . . . at a competitive disadvantage;" those dairies, he stated, "believed a shift to the throwaway plastic milk bottle would force them out of business in Minnesota. We have 38 of those small independent dairy operators in our state." Transcript at 115.

In addition to protecting local dairies, the Minnesota legislators sought to encourage use of paperboard containers for milk to "help promote Minnesota's natural resources, the wood fiber industry." Transcript at 115 (Testimony of Rep. Munger). Senator Ulland warned in debate that the bill was needed to ensure that the plastic milk container would not "knock out" paper containers: "That is going to have a significant effect on Northern Minnesota on our tax revenue on the employees and employers. That is why we have got to defeat this motion [to refer the bill to Committee] and pass the Bill." Transcript at 123.

The bill's supporters in the Minnesota legislature made no attempt to hide their bias toward "out-of-state" economic forces. The State of Minnesota itself in its brief in this Court quotes the bill's chief sponsor, Rep. Munger, who justified its enactment: ". . . so that the plastic industry isn't going to get a stranglehold in Minnesota . . ." Pet. Brief at 12; Transcript at 121. Rep. Munger, explicit in his disdain for outside industry, rebuked a fellow representative's motion to refer the bill back to the Agriculture Committee as follows: "I oppose your motion and I am surprised at you representing the dairy

* Testimony of Sen. William Luther, quoted at 121 of Exhibit J, a full transcription of the floor debates in the Minnesota Legislature which was admitted in evidence in the District Court [hereinafter cited as Transcript].

industry and the farmer (inaudible) the guys in the alligator shoes from New York and Chicago come here and tell you how to run your business." Transcript at 118.

Xenophobia was rampant in the legislature, as illustrated by Senator James Ulland in debate:

> There are important economic considerations in this Bill and perhaps they are more important than the environmental considerations . . . I don't think there is anything the matter with supporting the timber industry which is our third largest employer in the state. I think in fact that is one of our responsibilities to keep a healthy economy in the state rather than importing petrochemicals and importing plastic bottles from Chicago or wherever they are manufactured, certainly the natural resources aren't from here.

Transcript at 122-23.

Senator Ulland's frank recognition that the "economic considerations" behind the bill overshadowed "environmental considerations" was echoed by the bill's opponents, who saw the bill in its true light as: "an inter-industry economic struggle. It is not an environmental Bill at all . . ." Transcript at 122 (Testimony of Sen. Collin Peterson).*

The timing and rush to enactment of the statute indicates further that it was designed as a local economic protectionist measure. Passed just as "major structural change in the Minnesota market appeared to be imminent," Pet. Brief at 7, the legislation was enacted as plastic containers for milk were enjoying consumer acceptance and orders were to be placed with an out-of-state firm for over $1 million worth of machines to produce the containers. Pet. Brief at 7, 45.

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* See also statement of Sen. Dunn: "It came in originally under the guise of an environmental issue . . . During the course of that testimony, as Senator Peterson pointed out, it became obvious that it is not really an environmental issue, that the problem here is the desires and concerns and the economic gain between two different parts of the dairy industry . . ." Transcript at 123-124.

The legislature was moved by an intent to protect constituents, which may be proper in other circumstances. When interstate commerce is burdened (or embargoed, as in this case), such motives and effects cannot be tolerated if a truly unfettered national market is to be maintained. Hiding behind "the environment" cannot save such a misguided ban. The legislation was enacted to benefit a favored class: the local producers engaged in the pulp wood industry and the local dairies who sought protection from competitors using plastic milk containers.* The economic interests of both in-state dairies and the in-state wood pulp industry stood to benefit enormously from this legislation, a fact which belies the State's insistence that it is even-handed legislation.

B. The Legislation Is Hostile in Its Effect on Interstate Commerce

Not only is the Minnesota statute hostile in design to the principle of a national market, but it is hostile in effect to the operation of a free market and imposes an impermissible burden on interstate commerce. As this Court has noted, the concluding focus of the initial Commerce Clause inquiry is the "practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2016 (1980); *Hughes* v. *Oklahoma*, 441 U. S. 322, 336 (1979). Whether the statute at issue here was designed to insulate the State's economy (as the legislative history shows) or was inspired by environmental considerations, the practical result is that Minne-

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* *Cf. Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), where this Court upheld Maryland's legislation prohibiting local retail operations by vertically integrated petroleum companies in the face of Commerce Clause attack, finding that the statute would not in fact discriminate against interstate business in favor of locally-based competitors "because, as a matter of fact, there were no local producers or refiners to be favored." *Lewis*, 100 S. Ct. at 2018.

sota attempted to achieve its aim by impermissibly protecting its own in-state industries from out-of-state competition.

The long line of cases involving state regulation of milk are directly relevant, though Minnesota has attempted to regulate the packaging of milk rather than the product itself. In all of the "milk cases," this Court has found an undue burden on interstate commerce where the principal purpose or effect was to protect local economic interests from out-of-state competition—as is the case here.

Years ago, New York State made arguments similar to those raised here by Minnesota in its futile attempts to justify laws imposing conditions on the processing or sale of milk. In *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935) and *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525 (1949), the decisions found simple economic protectionism to be the effect of New York's laws, neither of which was "supported by health or safety considerations but solely by protection of local economic interests . . ." *Hood*, 336 U. S. at 531. The Court in doing so stressed the basic principle that a "state may not promote its own economic advantages by curtailment or burdening of interstate commerce." *Id.* at 532.

In *Baldwin*, the legislation prohibited the sale of milk imported from another state unless the price paid in the other state to the producer was up to the minimum prescribed by New York for purchases from local producers—a measure characterized by this Court in the *Hood* case as "designed in practical effect to exclude" imported milk from being sold in New York. *Hood*, 336 U. S. at 531. In *Hood*, another New York statute was struck down when it, as applied, denied a Massachusetts milk disributor the right to operate an additional milk receiving plant in New York, and in effect withheld New York milk from export. *Id.* at 531. All manner of ingenious rationale were used to justify these laws—to no avail because of their obvious aim and effect.

The Minnesota statute here discriminates against interstate commerce, establishing an "economic barrier against competition with the products of another state," *Baldwin*, 294 U. S. at 527, in two fundamental ways: (1) it imposes a restraint (and in some situations an absolute prohibition) on access to Minnesota markets by out-of-state milk sellers, plastic manufacturers, resin manufacturers, and other related businesses; and (2) it imposes a restriction on out-of-state buyers seeking access to Minnesota milk and other related products such as plastic milk bottles produced in the state. In both cases, the beneficiaries of the economic barrier are in-state industries.

In terms of the probable effects of this statute*, a major adverse impact will fall on out-of-state producers of equipment and machinery used in the production of plastic bottles (i.e., plastic blow molding equipment, plastic containers, and resin). Not one of the raw material manufacturers of pellets or plastic blow molding machines is located within the state of Minnesota. Transcript at 309. In fact, the trial court found that some businesses will be forced out of the Minnesota market entirely. Pet. App. at A-22, Finding 24. Further, manufacturers of plastic bottles, who are overwhelmingly located out-of-state, will also be forced out of the Minnesota market. The statute will also have a "ripple" effect on those manufacturers of plastic compo-

* The Minnesota trial court, in concluding that the Act imposes unconstitutional burdens on interstate commerce, found that the Act if implemented would prevent out-of-state dairies who market in Minnesota from marketing in nonreturnable plastic containers; would prevent in-state dairies from marketing milk interstate in such containers or marketing such containers interstate; would prevent plastic container manufacturers from marketing such containers interstate; would prevent manufacturers and distributors of blow molding equipment in interstate commerce from selling such equipment in Minnesota for the purpose of fabricating nonreturnable plastic milk containers; and would prevent out-of-state suppliers of polyethylene resin in interstate commerce from selling their product in Minnesota for the purpose of fabricating nonreturnable milk containers. Pet. App. at A-22, Finding 24.

nents, machines, or bottles who, because of the loss of the milk business in Minnesota, may also be precluded by economic factors from competing for business involving plastic bottles used for other purposes, such as packaging fruit juices or water. A further adverse impact will be felt by the out-of-state dairies who attempt to market within Minnesota in one type of container and outside the State's boundaries in another container; some may choose to cease selling in Minnesota altogether: a classic balkanization of interstate commerce.

Not surprisingly, based on the leglisative intent, the beneficiaries of this economic dislocation will be local Minnesota dairies without investments in plastic bottle equipment and the Minnesota pulp wood industry. The statute will, in effect, force all milk producers to sell only in paperboard containers in Minnesota since that container will be the only nonreturnable, nonrefillable container widely available. The trial court found, and Petitioner has admitted, that the statute was designed to and "would increase the use of a more expensive and environmentally harmful, non-returnable, non-refillable paperboard container." Pet. App. at A-20, Finding 14; Pet. Brief at 13, 42.

This barrier against access to Minnesota markets by out-of-state sellers parallels that constructed by North Carolina in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333 (1977). There, North Carolina's attempt to prescribe certain grading designations on closed containers of apples shipped into the state was invalidated on the ground that it raised the cost of doing business in the state only for out-of-state growers, thus building a wall around the local industry. Here, because of the absence of in-state producers of plastic blow molding equipment, or resin suppliers, and the virtual absence of container manufacturers, the most serious impact will fall on out-of-state businesses (whether engaged in packaging or in the milk industry itself) who wish to sell their products in Minnesota.

Another Minnesota statute was struck down on the same basis because it resulted in a windfall to those sellers engaged in the business within Minnesota at the expense of those from out-of-state. In *Minnesota* v. *Barber*, 136 U. S. 313 (1890), this Court found that a Minnesota statute requiring that animals slaughtered for human food had to be inspected by local inspectors within 24 hours in effect excluded fresh meat from the Minnesota market (although entirely fit for human consumption)* from animals slaughtered in other states.

The facts in cases such as *Hunt* and *Barber*, where the invalid statutes explicitly favored in-state dealers, contrast with *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978). There, the Maryland statute prohibiting local retail operations by vertically integrated petroleum companies was upheld because it conferred no such competitive advantage on in-state dealers at the expense of out-of-state dealers. *Id.* at 126.** In *Exxon*, the out-of-state dealers were not a target of the state legislation, nor were they affected adversely by it. Further, this Court specifically noted that "the Maryland statute does not discriminate against interstate goods," *Id.* at 125, unlike this action, where Minnesota has chosen to ban only plastic packag-

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* Similarly here, Minnesota's ban on plastic milk containers will inevitably result in the burdening of commerce in a legitimate and healthy food, namely the milk itself. This is quite different from situations where a state has been allowed to ban importation of noxious articles, such as diseased livestock, where the state "did not discriminate against interstate comerce as such, but simply prevented traffic in noxious articles, whatever their origins." *Philadelphia* v. *New Jersey*, 437 U. S. at 629.

** "In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which the State has been found to have discriminated against interstate commerce." *Exxon*, 437 U. S. at 126.

ing, thereby affecting interstate goods for the economic benefit of alternate in-state packaging materials.

II.

THE MINNESOTA BAN OF PLASTIC MILK BOTTLES CANNOT BE JUSTIFIED ON THE GROUNDS ADVANCED BY THE STATE

To avoid the impact of the protectionist nature of the statute, Minnesota argues that it should not be subject to close Commerce Clause scrutiny for three reasons: 1) it is an environmental measure, 2) with even-handed application to both local and interstate commerce, which 3) affects only a "localized" industry. None of these arguments is sufficient to shield this statute from the close examination it deserves under the Commerce Clause.

A. The Minnesota Statute Is Not an "Environmental Measure"

Labeling the Minnesota statute an "environmental measure" does not alter its purpose or effect on interstate commerce. This statute is not entitled to special deference because its *post facto* justifications relate to preservation of the environment.* In fact, these justifications are groundless, as shown by the record.

As this Court pointed out in *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978), while a state has every right to attempt to protect its environment, it may not do so by protecting itself from interstate commerce. In that action, this Court found that a New Jersey statute prohibiting the importation of most solid or liquid waste which originated or was collected outside New Jersey violated the Commerce Clause. *Id.* at 624. Numerous

* In reviewing a statute under Commerce Clause standards, this Court is not bound by "the name, description or characterization given it by the legislature or courts of the state." *Hughes* v. *Oklahoma,* 441 U. S. at 336.

environmental justifications were raised in support of the statute, including the argument that it was intended to protect the remaining New Jersey landfill sites. However laudable the purpose, this Court held, "it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27. Parochial legislation is invalid under the Commerce Clause no matter what its arguable ends, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626.

Here, the arguable ends amount only to a legalistic smokescreen laid down to obscure the protectionist effect of the statute. This smokescreen evaporated at trial, when credible support was not found for the "environmental" rationale.

The "environmental" justification here is similar to assertions in the other milk cases that the challenged statutes were only protecting the health of their citizens rather than their economic well-being. For example, in *Baldwin* v. *Seelig, supra,* New York argued that the statute was a valid exercise of state police power, and that the economic motive was "secondary and subordinate" to the motive of making its "inhabitants healthy." 294 U. S. at 523. The argument said too much:

> Economic welfare is always related to health, for there can be no health if men are starving . . . To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Id. Similarly, in *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 354 (1951), this Court rejected the view that the challenged ordinance should be held valid "simply because it professes to be a health measure."

The Minnesota statute here simply is not an environmental measure. If it were, it would not fall so woefully short of responding to any legitimate environmental concern other than by lip service. First, the record in this action shows that the statute cannot promote the use of refillable containers because such containers were largely extinct in the state before the statute was enacted. Thus, the Minnesota milk market will return to paperboard cartons, and not refillables—a result the legislature intended. Pet. App. at A-42, 43; Record at 339-40, 427.

Second, the statute cannot further any solutions to solid waste disposal problems in Minnesota or elsewhere. As demonstrated by the trial record, the plastic container presents fewer solid waste problems than paperboard in all respects, which even a cursory analysis would have confirmed. *See* Pet. App. at A-21. The legislature, however, was understandably not interested in these facts because the focus of the statute was directed elsewhere: at the protection of local industry.

The *amicus* brief of the United States emphasizes this so-called "environmental" issue as well. It is the right argument in the wrong case. With scant reference to the evidence, the United States assumes that the State of Minnesota has embarked upon a noble experiment in this ban, with alternative solutions to problems of solid waste disposal and energy conservation. Thus, the United States argues that Minnesota should be encouraged, even if the statute is "under-inclusive" and imperfect. Brief for United States at 8-9. Sadly, the record demonstrates that this is not that case. The Minnesota statute can only be viewed as an experiment if its legislative history is ignored, its impact on interstate commerce glossed over, and its absence of rational relationship to environmental reality disregarded. The Minnesota statute is not a noble experiment; it is base isolationism.*

* Nor is the Minnesota statute comparable to local mandatory deposit laws relating to beer and soft drink containers, which have unsuccessfully sought to solve perceived problems by positive and negative monetary incentives.

B. The Minnesota Statute Is Not "Even-Handed" in Its Application

Minnesota also argues that the law affects in-state as well as out-of-state interests evenly and "applies uniformly to all affected products regardless of point of origin." Pet. Brief in Minn. Sup. Ct. at 73. The argument misses the point. The Minnesota interests may also be affected is immaterial under the Commerce Clause. In *Dean Milk Co., supra,* the challenged ordinance was deemed violative of the Commerce Clause, although it affected in-state as well as out-of-state milk producers: "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." 340 U. S. at 354, n. 4*. The same argument also failed in *Philadelphia* v. *New Jersey,* 437 U. S. at 626. There, the State pointed to the fact that New Jersey landfill operators were among the plaintiffs as evidence that the statute would not benefit New Jersey commercial interests at the expense of out-of-state ones. This Court rejected the argument, finding such an in-state/out-of-state distinction was too restrictive; the real issue is whether the State has attempted to achieve its goal "by the illegitimate means of isolating the State from the national economy." *Id.* at 627.

In some instances this Court has deferred to certain state regulations when "their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Raymond Motor Transporta-*

* See also *Minnesota* v. *Barber,* 136 U. S. at 326; *One-Way Disposal, Inc.* v. *City of Portland,* 14 E. R. C. 1577 (D. C. Or. 1980), where the District Court held that the City of Portland's ordinance closing its only public landfill to garbage collected outside the metropolitan Portland area, including garbage coming in from the State of Washington, violated the Commerce Clause, rejecting the defendant's assertion that the Portland ordinance was valid because it prohibited some intrastate as well as interstate garbage.

tion, Inc. v. *Rice,* 434 U. S. 429, 444, n. 18 (1978). *See also South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 187 (1938); *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 783 (1938); L. Tribe, *American Constitutional Law,* § 6-5 (1978). Here, however, the burden of the Minnesota law banning plastic milk containers falls on out-of-state businesses which had previously competed in all aspects of the milk container industry. Though the legislature did not artlessly target interstate commerce in the wording of the statute, the effect is identical. The injured parties, as intended, are the businesses from outside Minnesota. Unlike *Barnwell,* where the state regulation affected shippers equally whether in interstate or intrastate commerce, here the Minnesota statute benefits in-state industry at the expense of out-of-state competitors, thus eliminating any incentive for Minnesota's own political processes to temper the effect of its ban on plastic milk containers.* Minnesota here has accomplished what the Court forbade in *Philadelphia* v. *New Jersey,* 437 U. S. at 627, when New Jersey attempted to isolate itself from the national economy in an important area of commerce.

C. The Minnesota Statute Is Not Saved Because It Relates to a Business of Local Concern

The State of Minnesota here seeks to rely on the localized nature of the dairy industry to escape scrutiny under Commerce Clause standards. Pet. Brief in Minn. Sup. Ct. at 77. Yet labeling an interest "local" does not end the analysis. The State must still act in a manner consistent with the Commerce Clause principle that one state may not "erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.,* 100 S. Ct. at 2015 (1980). In *Lewis,* this Court found regulation of "bank-

* *Cf. Can Manufacturers Institute* v. *Minnesota,* 289 N. W. 2d 416, 420 (Minn. 1979), where the Minnesota Supreme Court upheld a packaging review act, finding that it was not . . . "designed or will operate in favor of local interests."

ing and related financial activities" to be "of profound local concern," yet nevertheless invalidated the Florida statute there as unconstitutional. Here, the "local concern" is even less evident, since the statute does not regulate the local dairy industry except peripherally by prescribing its containers. In fact, the regulation is of the packaging industry, which was recognized as the out-of-state culprit.

To focus inappropriate attention on the in-state dairy industry and minimize the burden on interstate commerce, the State of Minnesota has cited *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346 (1939), for the proposition that "the effective selling radius of most dairies is relatively small." Pet. Brief in Minn. Sup. Ct. at 77. Although the *Eisenberg* case noted that only 10 percent of the milk produced in the state was destined for interstate commerce, in that particular case the statute regulating the milk industry was upheld only because its impact on interstate commerce was "incidental," as this Court pointed out in *H. P. Hood* v. *Du Mond,* 336 U. S. at 530, in distinguishing the *Eisenberg* holding. In the *Hood* case, on the other hand, the state milk regulations were "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local interests." *Id.* at 530-31. The ban on plastic milk containers here also has the "avowed purpose" and "practical effect" of cordoning off the Minnesota market to outside competition, a discriminatory impact that invocation of "local concern" can not overcome.

D. The Legislation Does Not Advance Legitimate State Policies

Given the disparate impact of this legislation on interstate commerce to the benefit of local industry, the burden falls on the State of Minnesota "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local in-

terests at stake." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. at 353 (1977); *Dean Milk*, 340 U. S. at 354; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 375 (1976); *Lewis*, 100 S. Ct. at 2018-19. Minnesota has not succeeded in justifying this law, and both Minnesota courts found that the evidence here demonstrates that none of the State's purported goals are credibly advanced by this statute.

The State argues that three interrelated state policies are served by the ban on plastic milk containers: (1) to halt the proliferation of the plastic containers before they "become irreversibly dominant in the market and before there developed such economic reliance upon the plastic container—in the form of capital investment and employment—that eradication of this admittedly-bad container would entail great social and economic dislocation" (Pet. Brief at 12); (2) to conserve nonrenewable fossil fuels, since the polyethylene from which plastic milk containers are made is refined from either crude oil or natural gas, while paper-board containers are produced primarily from wood pulp; and (3) to deal with the solid waste problem, "particularly the landfill space which would be consumed by throwaway plastic jugs." Pet. Brief at 22. These are obviously legitimate state interests. Not one them is served by this legislation. The only goal served by the statute is the protection of local industry.

The first purported environmental goal, to prohibit the plastic container before it becomes dominant in the market, is tenuous at best, and depends upon the credibility of other goals. Minnesota contends that because the alleged problem of the plastic container is still "on the horizon," this statute was passed to check its growth, which the State believes to be "virtually unstoppable once it gains a foothold in a market" as a result of "its consumer convenience features." Pet. Brief at 6. The State's interest in nipping the plastic milk container in the bud is specious, since the container was intro-

duced in Minnesota long before this act was passed, especially outside of the Minneapolis/St. Paul area. The Supreme Court of Minnesota affirmed this finding. Pet. App. at A-44. The record at trial demonstrated that plastic milk containers were widely used in Minnesota by the early 1970's. Record at 329, 421, 449.

Reduction of solid waste and conservation of energy are both laudable goals. They will not be served by this statute. The District Court rejected the argument that the statute could succeed in any way to effect such purported policy goals, since the vacuum created by the ban on plastic milk containers will be filled by a return to nonrefillable paperboard milk containers. Pet. App. at A-21. The Supreme Court of Minnesota likewise held that the classification separating paper from plastic nonrefillables was not reasonably related to these two state interests (Pet. App. at A-35); paperboard containers are environmentally inferior to plastic on all counts. Pet. App. at A-42. Thus the ban on plastic nonrefillable milk containers not only fails to advance the act's objectives but in fact is counter-productive.

CONCLUSION.

For the foregoing reasons, *amici* herein respectfully request that the judgment of the Supreme Court of the State of Minnesota be affirmed on the ground that the Minnesota ban on plastic milk containers unconstitutionally burdens interstate commerce.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MINNESOTA,

Petitioner,

v.

CLOVER LEAF CREAMERY CO., ET AL.,

Respondents.

ON A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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No. 79-1171

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MINNESOTA,

Petitioner,

v.

CLOVER LEAF CREAMERY CO., ET AL.,

Respondents.

ON A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF AMICUS

This brief is submitted as *amicus curiae* on behalf of Mid-America Legal Foundation (*"Mid-America"*). The written consents of all parties are filed with the Clerk of the Court.

Mid-America, based upon its expertise and purpose, has an interest in the disposition of the case which is before this Court on a writ of certiorari to review the judgment and opinion of the

Supreme Court of Minnesota invalidating Minnesota Statute § 116 F.21-22 in *Minnesota* v. *Clover Leaf Creamery Co.*, 289 N.W. 2d 79 (Minn. 1979).

Mid-America was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in questions of law of a national scope that originate in or have a direct effect on the Mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the Minnesota statutory ban on the sale of milk in plastic containers violates both the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution. The statute lacks any rational basis in fact and unduly burdens interstate dairy and plastic industries in an effort to protect local paperboard interests. If this legislation is allowed to stand, it could open floodgates for other measures protecting local interests from competition.

Since our economic unit is the nation and not the separate states, *see M. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 537-8 (1949), this Court should affirm the judgment of the Supreme Court of Minnesota. The statute reflects the very type of economic protectionism which the Commerce Clause was designed to prevent.

SUMMARY OF ARGUMENT

The Minnesota ban on plastic milk containers violates the Equal Protection Clause because the statutory discrimination is not rationally related to the objectives of the Act. The stated objectives of the law were to solve the state's waste management problem and to encourage recycling. However, a statutory classification regulating only plastic and not paperboard milk containers is irrational because the plastic is no worse than the paperboard in terms of any of the stated environmental objectives. With respect to several of such environmental concerns all available evidence confirmed that the plastic is superior.

Although a legislature need not formulate laws which strike at every possible evil at once, and may implement legislation "one step at a time," equal protection requires, at a minimum, that the first step taken by the legislature be rationally related to its objectives. A ban on the plastic containers which leaves the paperboard containers unregulated is actually a step backward from the environmental goals of the Act.

Under the Commerce Clause, the state power to regulate commerce is limited because Congress has sole power to regulate commerce among the several states. Consequently, this Court and not the state legislatures must be the final arbiter of the reasonability of local limitations upon the free flow of interstate commerce. Where the burden on commerce outweighs the state's interest in its local purpose, the statute will be voided. Here, the statute bans a number of interstate commercial activities and, thus, substantially impedes the flow of interstate commerce. This discrimination is weighed against a desire to protect in-state industry, a purpose which this Court has consistently refused to entertain. Further, the statute does not advance environmental goals. Thus, this discriminatory ban on plastic milk containers fails to produce the desired results, fails to provide the most efficient or effective alternative, and violates the Commerce Clause.

ARGUMENT

1. The Minnesota Statute Banning the Sale of Milk in Nonreturnable, Nonrefillable Plastic Containers Violates the Equal Protection Clause Because it has No Rational Basis in Fact.

The ban on plastic milk containers effected by Minn. Stat. § 116 F.21-22 which purposefully leaves paperboard milk containers unregulated is not rationally related to the environmental objectives stated in the Act and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The test for evaluating state statutes challenged on equal protection grounds was set forth by this Court in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions, such as race, religion or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that *the classification challenged be rationally related to a legitimate state interest.* 427 U.S. at 303 (emphasis supplied).

Clearly, the *purported* goals of the Minnesota statute to reduce solid waste disposal problems and to conserve energy and natural resources are legitimate state interests. However, this *amicus* maintains, and the Minnesota courts have decided, that the actual purpose of this Act was to effect an impermissable preference for local paperboard interests. The ban on plastic milk containers eliminates a product which causes fewer adverse environmental consequences than its unregulated paperboard counterpart. Thus, the purpose behind the Act was not to advance environmental concerns but:

> "to promote the economic interests of certain segments of the local dairy and pulpwood industries at

> the expense of the economic interests of other segments of the dairy industry and the plastic industry [,]" (Pet. Cert. App. at A-29.)

and

> "to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." (Pet. Cert. App. at A-27.)

The district court and the Supreme Court of Minnesota correctly invalidated the statute after examining and reexamining both the legislative history and the evidence relating to the environmental impact of both plastic and paperboard containers. As this Court stated in *Williams* v. *Rhodes,* 393 U.S. 23 (1968):

> In determining whether a state law violates the Equal Protection Clause, we must consider *the facts and circumstances behind the law, the interests which the state claims to be protecting and the interests disadvantaged by the legislation.* 393 U.S. at 30. (emphasis supplied)

The trial court appropriately noted that it "may not substitute its judgment for that of the legislature as to the wisdom or desirability of the act." (Pet. Cert. App. at A-29.) However, in their review of the evidence, both Minnesota courts found that plastic milk containers are no worse than paperboard containers with respect to any of the stated environmental concerns. Moreover, with respect to several of the stated concerns, plastic milk containers are environmentally preferable to paperboard.

Plastic containers are inert and contribute to landfill stability, an important factor in future use of the land. Additionally, they burn completely and do not emit noxious gases. Paperboard containers, on the other hand, decompose and cause the formation of leachates which seep into the ground and contaminate groundwater. (Record at 72-73, 385, 594,

692; Pet. Cert. App. at A-6, A-25-26.) They do not burn as efficiently as plastic containers and they do emit noxious gases. (Record at 69-70; Pet. Cert. App. at A-6, A-25-26.)

The evidence also revealed that the amount of crude oil and natural gas used for producing plastic nonrefillables is negligible. Thus, a ban on these containers would not materially increase the volume of natural gas or oil available for other purposes. (Pet. Cert. App. at A-12.) Moreover, the plastic milk containers were recyclable, whereas the paperboard were not. In fact, Clover Leaf Creamery already had initiated its own recycling program. (Pet. Cert. App. at A-9 n.14.)

In sum, the evidence conclusively demonstrated that the statute's actual purpose was to give certain local interests an advantage and that the statute's purported goal of reducing energy waste would be hindered by a ban on plastic milk containers. On the evidence, it was impossible to conceive of any state of facts that could justify this statutory discrimination, *McGowan* v. *Maryland,* 366 U.S. 420 (1961). Therefore, this Court should affirm the judgment of the Supreme Court of Minnesota that there was no rational basis for banning plastic but not paperboard containers for milk in order to conserve energy and natural [non-renewable] resources or to facilitate waste management.

It is well established that legislation will not fail merely because it does not attack every conceivable phase of a problem. Petitioner asserts that the ban on plastic containers is valid as a "first step" in some future program in which presumably the environmentally inferior paperboard containers also will be prohibited. *Amicus* maintains, however, that the "step by step" analysis approved by this Court presumes, at the very least, that the *first step* be rationally related to the stated objectives of the Act.

For example, in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976), this Court upheld the constitutionality of a city ordinance banning street vendors in the French Quarter. The ordinance contained a grandfather clause which exempted

"vendors who had operated within the Quarter for 8 years." This clause disqualified all vendors except two and was attacked as an arbitrary and irrational method of furthering the city's purpose of preserving the traditions of the French Quarter. The Court, however, noted that the ordinance was a proper step by step approach to a problem and that the city had eliminated most of the problem by eliminating all the vendors but two. The Court stated at 427 U.S. 297, 303-304:

> Legislatures may implement their program step by step, *Katzenbach* v. *Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L. Ed. 2d 828 (1969), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g. Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L. Ed. 563 (1955).

New Orleans is readily distinguished.[1] The statute here in question does not represent any step toward the amelioration of an evil. It is essentially a step backward. It encourages the use

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[1] In *New Orleans,* the Court commented that, except for *Morey* v. *Doud,* 354 U.S. 457 (1957), there had been no other case in the last fifty years in which this Court invalidated a wholly economic regulation solely on equal protection grounds under the federal Constitution. However, state courts which are not subject to the interstate limitation of the Commerce Clause have regularly invalidated state economic regulations on equal protection grounds. *E.g., Louisville & Nashville Railroad Co.* v. *Faulkner,* 307 S.W. 2d 196 (Ky. 1957); *Price* v. *Amdal,* 256 N.W. 2d 461 (Minn. 1977); *State* v. *Lee,* 356 So. 2d 276 (Fla. 1978). Although state courts may not impose greater equal protection restrictions than this Court as a matter of federal constitutional law, *Oregon* v. *Haas,* 720 U.S. 714, 719 (1975), state courts have continued to use the equal protection rubric against economic discrimination "as some small degree of protection against this monopoly by minority." Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91, 117 (1950). State preference for the equal protection rubric reflects the fact that state constitutions contain equal protection provisions which have been construed generally to parallel the federal but necessarily do not contain the equivalent of the Commerce Clause. Consequently, state concepts of equal protection are more readily applicable to commercial rights. *See* Minn. Const. Art. 1, § 2 (1974).

of a container that creates serious avoidable waste management problems. As the Minnesota Supreme Court realized, even under the "one step at a time" approach, the first step must be a forward one and must be one which is rationally related to the objectives of the Act. Since paperboard containers are environmentally inferior to plastic containers, and the Act encourages their use, the ban against plastic containers has no rational basis in fact and violates the Equal Protection Clause.

In considering any "first step" rational, it should be noted that the Act was not an experimental first treatment of the environmental concerns related to packaging. Prior to enactment of the statute in question, Minnesota adopted the Package Review Act, Minn. Stat. 116F.01-08 (1973), a comprehensive solid waste management law which provides for review by the Minnesota Pollution Control Agency of all packages marketed in the state. The stated goals of the Package Review Act are the same as those of the statute in question and in fact, specifically are referred to in § 116F.21. On September 7, 1979, *the same day* that the Supreme Court of Minnesota decided the instant case, it upheld the constitutionality of the Package Review Act in *Can Manufacturers' Institute* v. *State,* 289 N.W. 2d 416 (Minn. 1979). The Minnesota court praised that Act as a comprehensive and flexible means of implementing the goal of solid waste management and held that it did not violate the Commerce Clause. In practical effect, the absolute ban on plastic milk containers was an arbitrary exception to the Package Review Act which otherwise provides for comprehensive regulation of packaging materials based upon a reasonable evaluation of their environmental impact.

2. The Minnesota Statute Discriminates Against and Unduly Burdens Interstate Commerce.

As this Court stated recently in *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-326 (1979):

> The few simple words of the Commerce Clause—"The Congress shall have power . . . to regulate commerce . . . among the several states . . ."—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional convention: the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relation among the colonies and later among the states under the Articles of Confederation (citation omitted). The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulations.

In fulfilling this role, the Court has formulated a benefit-burden balancing test for evaluating state legislation. This test was first enunciated in *Pike* v. *Bruce Church Inc.*, 397 U.S. 137, 142 (1970) and has been used extensively by this Court in the past decade:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. (citation omitted). If a legitimate local purpose is found, then the question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could have been promoted as well with a lesser impact on interstate activities.

Under this general rule, one first must examine the statute to determine if it regulates evenhandedly with only incidental effects on interstate commerce or if it discriminates against interstate commerce, either on its face or in its practical effect. While the Minnesota ban on plastic containers appears neutral

on its face, at least with respect to interstate commerce, it in fact places several substantial and impermissible burdens on interstate commerce.

First, out-of-state dairies that sell milk in Minnesota (represented by plaintiff Wells Dairy, Inc.) are prevented from selling their milk in the plastic containers in Minnesota. Second, out-of-state manufacturers and distributors of blow-molding equipment in interstate commerce (represented by plaintiff Uniloy, Inc.) are prevented from selling their equipment for the purpose of producing these milk containers for sale in Minnesota. Third, plaintiff Phillips Petroleum and all other out-of-state suppliers of polyethylene resin are prevented from selling their product for the purpose of manufacturing these containers for sale in Minnesota. The practical effect of these burdens is to bar the plastics industry from selling machinery and supplies for the manufacture of milk containers for sale in Minnesota.

The state legislators were quite candid in admitting that they wanted to stop the plastic industry before it got a foothold in the milk container business. (*See* Pet. Brief at 12-14 for quotes from the legislative debates). Incredibly, the petitioner, *amicus* Sierra Club and *amicus* United States not only admit this fact, but suggest that it was admirable of the legislature to do so.[2] The legislative history of the Act further demonstrates that the legislators openly sought to protect the local timber industry, "the third largest employer in the state", which supplies the pulpwood from which the paperboard containers were made. (Record at 112-115, 119-122, 129-130). The district court in fact ruled that the actual intent and effect of the Act was to promote the local pulpwood industry and certain

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[2] *See* Pet. Brief at 45-46, Sierra Club Brief at 7-8 and Brief of the United States at 18. Approval of the Package Review Act on the same day as the decision in this case belies the suggestions of *amici* that the decision of the Supreme Court of Minnesota was anti-environmental. *Can Manufacturers' Institute* v. *State,* 289 N.W. 2d 416 (Minn. 1979).

local dairies at the expense of the out-of-state dairies and plastics industry. "[T]he general principle [is] that the Commerce Clause prohibits a state from using its regulatory powers to protect its own citizens from competition." *Lewis* v. *B.T. Investment Managers,* ____ U.S. ____, 100 S. Ct. 2009, 2019 (1980).

The instant case is remarkably similar to *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) which invalidated a facially neutral North Carolina law regulating the marketing of apples. The Court stated that the practical effect of the statute was to unfairly discriminate against Washington state apples and further "to offer the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit."

Moreover, under the *Pike* test referred to earlier, it is necessary to determine whether the statute serves a legitimate state purpose. As discussed in Section 1, the stated goals of the statute, (i.e. solid waste management and conversation of energy and natural resources) fall within the ambit of legitimate state purposes. However, the inquiry cannot end there. State statutes even with ostensibly legitimate purposes have been invalidated as violative of the Commerce Clause. *See Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978) (stated goal of waste management); *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979) (stated goals of conservation of fish); *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (stated goals of consumer protection). As this Court noted in *Hughes* v. *Oklahoma*:

> " . . . when considering the purpose of a challenged statute, this court is not bound by '[t]he name, description or characterization given it by the legislature and the courts of the State', but will determine for itself the practical impact of the law." 441 U.S. at 336.

Though the stated goals may be admirable, the evidence adduced at trial established that the banned plastic containers were environmentally superior to the unregulated paperboard containers which created a more serious waste management problem. Thus, the statute does not serve but rather hinders the stated goals. Again, the present case parallels *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), where the Court stated as follows:

> The several states unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs but *the challenged statute does remarkably little to further that laudable state goal* . . . . Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. 432 U.S. at 353 (emphasis supplied).

Finally, under the *Pike* test one must consider whether the statute's stated purpose could better be served by an alternative means that would not burden interstate commerce. For example, in *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978), the Court invalidated a New Jersey statute that prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the state." The Court observed that the statute's goal of reducing waste management problems might have been served by some means other than an outright ban on these wastes:

> Thus it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its resident's pocketbooks as well as their environment. *And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the state's remaining landfills even though interstate commerce may incidentally be affected.* But whatever New Jersey's ultimate purpose, it may not

> be accompanied by discriminating against articles of commerce coming down outside the state, unless there is some reason, apart from their origin to treat them differently. 437 U.S. at 626-627. (additional emphasis supplied)

Although the New Jersey statute facially discriminated against interstate commerce and the Minnesota statute appears facially neutral, they are similar in their total irrevocable bans on articles of commerce.

One alternative means of solving waste disposal problems is demonstrated in the Package Review Act which was upheld in *Can Manufacturers' Institute* v. *State,* 289 N.W. 2d 416 (Minn. 1979). The Minnesota Supreme Court noted that this Act was both a comprehensive and flexible method of dealing with the solid waste disposal problem. Safeguards were built into the Package Act and its regulations to protect against an unfair or arbitrary ban by the Minnesota Pollution Control Agency on the sale of a package. First, the agency decision could be reviewed by the Minnesota Environmental Quality Board. Second, if the Board did not reverse the agency decision, then the ban would only continue until the last day of the next following legislative session unless the ban was explicitly extended by law. Minn. Stat. § 116F.06 subdiv. 2.

The Minnesota court found that this scheme regulated evenhandedly and did not discriminate in favor of local interests. Although the Package Review Act contains a grandfather clause for containers selling in the state before May 25, 1973, which includes the plastic milk container in question, the act is an example of the type of alternative legislation that would better serve the state's goals and provide an appropriate factual record and informed agency guidance for specific legislative actions.

Another alternative method of serving the goal would be to place a tax on both paperboard and plastic containers that are not recyclable to encourage the development and production of recyclable containers and recycling programs.

In sum, the Minnesota ban on plastic milk containers not only fails to meet the rational basis test required by the Equal Protection Clause but also fails to meet the three criteria of the benefit-burden balancing test required to sustain state legislation under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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No. 79-1171

IN THE

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OCTOBER TERM, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HANOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC. and M-H PACKAGING SYSTEMS, INC.,

Respondents.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF AMICUS CURIAE BY THE MINNESOTA DAIRIES FEDERATION

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IN THE

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OCTOBER TERM, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, ET AL.,

Respondent.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF FOR THE MINNESOTA DAIRIES FEDERATION AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court correctly hold that the statutory ban on the sale of milk in non-returnable, non-refillable plastic containers violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does the statutory ban on the sale of milk in non-returnable, non-refillable plastic containers discriminate against or unreasonably burden interstate commerce in violation of Article 1 of Section 8 of the United States Constitution?

INTEREST OF THE MINNESOTA DAIRIES FEDERATION

This brief of *amicus curiae* is filed with the consent of all parties in the case.

The Minnesota Dairies Federation is composed of 18 members, all of which are dairies doing business in the state.[1] Many members of the Minnesota Dairies Federation sell milk and other dairy products in North Dakota, South Dakota, Iowa, and Wisconsin as well as Minnesota. Members also compete with out-of-state dairies in Minnesota markets. The Minnesota Dairies Federation represents all of the major dairies in Minnesota. There are four or five producer-handlers which are not members, but they produce less than 3% of the milk volume sold in Minnesota. Another 5% to 10% of the milk sold in Minnesota comes from out-of-state dairies which are not members.

This case concerns the constitutionality of a Minnesota statute which bans the sale of milk in non-returnable, non-refillable plastic containers. Because milk is a highly standardized commodity, the type of packaging used for milk is one of the principal areas of competition among dairies. Packaging can improve filling and transportation efficiency, decrease operating costs, enhance sanitation and product safety, and increase consumer acceptance and sales.

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[1] Two members of the Minnesota Dairies Federation, Clover Leaf Creamery Company and Marigold Foods, Inc., are plaintiffs in the instant case. Seven other members appeared as *amici* in support of the State's motion to dismiss at a pre-trial hearing. Their argument was simply that a prompt resolution of the case would be advantageous to them economically. Some of them now buy plastic bottles from Clover Leaf and M-H Packaging Systems, Inc. another plaintiff-respondent. The membership vote on participation in the case as an *amicus* was unanimous.

In the Minnesota market, non-refillable paperboard containers virtually eliminated refillable glass containers many years ago because of advantages in transportation efficiency, sanitation and safety, and reduced operating expenses. (R. 155.) Consumers also preferred the light weight and ease of handling of the paperboard container.

During the last ten years, the plastic container has been challenging the paperboard container in the area of milk packaging. The dairies and consumers have strongly approved of the plastic container because of its resistance to breakage, its even lighter weight (60-65 grams versus 115 grams), its resealable screw-on or snap-on cap, and its built in handle which makes carrying and pouring comparatively easy.

Members of the Minnesota Dairies Federation have been using plastic containers since the late 1960's (R. 353-354). Most of those members using the plastic milk container purchased the bottles from manufacturers in Illinois and Minnesota and filled the containers on converted paperboard filling lines. Several companies have, however, purchased machines for the manufacture of their own bottles in the dairies, and have invested substantial amounts of money in those operations. (R. 332, 421, 449.) Where sufficient volume exists, the dairy which manufactures its own plastic containers can reduce its packaging costs. The Minnesota Dairies Federation members have a strong interest in the markets which have been developed over the years through the use of the plastic milk container and in protecting the investments made in equipment and plant facilities.

A ruling by this Court upholding the statutory ban on the sale of milk in plastic containers in the State of Minnesota would remove the principal item of competition between dairies in Minnesota and impair their ability to compete successfully in the surrounding states. Ultimately, the consumers of Minnesota and the surrounding states will suffer since they will not have the advantage of competition between dairies, and the benefits, economic or otherwise, that competition produces.

STATEMENT

During its 1977 session, the Minnesota Legislature enacted 1977 Minn. Laws Ch. 268, codified as Minn. Stat. § 116f. 21 and § 116f.22. That statute banned the sale of milk in non-returnable, non-refillable rigid or semi-rigid plastic milk containers in the State of Minnesota. Sour cream, cottage cheese, and yogurt were products specifically exempted from the statutory ban. Other drinks such as fruit juices, carbonated beverages, and other non-dairy drinks were not affected. Soft drinks have been sold in Minnesota in plastic bottles since January, 1980. To date, no legislative or regulatory action has been proposed or taken to restrict the use of any of those plastic containers.

The Respondents challenged the constitutionality of the ban on the sale of milk in plastic containers. After a full evidentiary hearing on the matter, the trial court concluded that the statute violated the Commerce, Due Process, and Equal Protection clauses of the United States Constitution. The Supreme Court of the State of Minnesota affirmed the trial court's decision on equal protection grounds without addressing the other issues.

After a detailed review of the facts concerning the legislative background and environmental impact of plastic containers, both the trial court and the Minnesota Supreme Court concluded that the ban on plastic did not further the Act's goal of encouraging the use of refillable milk containers and that the plastic containers were no worse, and in many instances, superior to, the paperboard environmentally. The Court concluded that while a legislature may attempt to remedy a perceived problem one step at a time, the initial step must have a rational relationship to a legitimate state interest and the ban on plastic did not.

SUMMARY OF ARGUMENT

The arguments concerning the statute's violation of the Equal Protection Clause of the U.S. Constitution can be best presented to this Court by the Respondents. Suffice it to say for purposes of this discussion that in reviewing the available data on environmental impacts of milk container systems, the Minnesota Dairies Federation has concluded that the 60 to 65 gram container which is presently being used by our members in the State of Minnesota and in the surrounding states to which they market (R. 245, 285, 341, 453) appears to have several environmental advantages over the paperboard container, e.g., light weight, recyclability and land-fill stability, and is equal to, if not better than, paperboard in practically all other impact categories. The members of the Minnesota Dairies Federation did not originate and continue the use of the plastic milk container with the belief that it would ravage the environment of our state. The trial court and the Minnesota Supreme Court have reached the same conclusion and the evidence introduced at trial strongly supports those results.

The principal concern of the Minnesota Dairies Federation is the effect which the ban on the sale of milk in plastic containers would have on the ability of its members to compete in interstate markets. The Commerce Clause of the U.S. Constitution has been interpreted by this Court to forbid the promotion of local economic interests when affected by discrimination against interstate commerce. In the instant case, the legislature's discriminatory motive is apparent in its legislative history and in the effect of the Act which overtly blocks the free flow of interstate commerce at the Minnesota border by prohibiting the sale of milk in plastic containers.

Even if the statute were assumed to regulate evenhandedly to effectuate a legitimate local public interest, the burden which the ban on plastic containers imposes on the Minnesota milk industry is clearly excessive in relation to the putative local benefits. In banning the sale of milk in plastic

containers, the statute removes a principal element of competition among Minnesota dairies, hinders Minnesota dairies in marketing their products in other states, and places Minnesota dairies in an unfair competitive position with items such as fruit juices, carbonated beverages and other drinks which can be sold in plastic containers.

ARGUMENT

THE STATE OF MINNESOTA'S BAN ON THE SALE OF MILK IN NON-RETURNABLE, NON-REFILLABLE PLASTIC CONTAINERS VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court has indicated that the tests to be applied to a statute which is challenged under the Commerce Clause are first, a virtually *per se* rule of invalidity which is applied to statutes that affect economic protectionism; and second, a more flexible rule commonly referred to as the balancing test, which is applied to statutes which do not have as their object the obstruction at a state's borders of the free flow of commerce. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). *Lewis v. BT Investment Managers, Inc.,* ____ U.S. ____, 100 S. Ct. 2009 (1980). We submit that under either of these rules, the ban on the sale of milk in plastic containers in Minnesota is unconstitutional.

While it is unusual to find such statements of legislative motive, Representative Munger, the sponsor of the Bill in the House of Representatives, clearly stated that he had not considered the environmental impacts of the plastic container, *viz a viz* the paperboard and, instead, pointed to the evils of the out-of-state plastic industry and the need to protect local business. (R. 119-121.) In the debates that occurred in the House and Senate, legislators repeatedly referred to the protection of the Minnesota timber and pulp industry (R. 115, 122, 125) and the Bill was characterized as economic rather than environmental on several occasions. (R. 121-122, 124, 129-130.)

A quote from Representative Munger is especially telling with regard to his hostility toward interstate interests:

> I don't think we need to have anybody from New York in the plastics industry come in here and tell us farmers how to farm. We don't need anyone to come in here to farm the farmer. (R. 112-113.)

Both the protectionist motive and the practical effect of the ban on the sale of milk in plastic containers discriminate against those doing business in interstate goods. A Minnesota dairy which manufactures its own plastic containers and sells its milk in those containers can do business in Wisconsin, but must change its entire system to be able to sell its product in its home state of Minnesota. Without home state sales to provide volume, interstate sales in plastic containers become too expensive. With the return to an all paperboard packaging system in Minnesota, the out-of-state dairy with the plastic container would have the competitive edge in the interstate market.

Even on an intrastate basis the statutory ban on the sale of milk in plastic containers discriminates against the milk producer. While milk cannot be sold in plastic containers, fruit juices and soft drinks can, and are, being sold in the State of Minnesota in plastic containers. Milk competes with both fruit juices and soft drinks in the Minnesota market. The arbitrary barrier of the ban on the sale of milk in plastic containers would prevent members of the Minnesota Dairies Federation from effectively competing against these products in either Minnesota or out-of-state markets.

Assuming, without conceding, for the sake of argument that the statute was intended to effect a legitimate local interest, the ban on the sale of milk in plastic containers should not be upheld because the burden it imposes on interstate commerce is extreme when compared to the supposed local benefits it would create.

This Court has stated that even where a statute regulates even-handedly to effectuate legitimate local public interest, it will not be upheld if the burden imposed on commerce is

clearly excessive in relation to the local punitive benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The effects on interstate commerce in the instant case are great while the local benefits are zero, if not a negative factor.

Those members of the Minnesota Dairies Federation which manufacture plastic bottles and sell their milk in plastic containers would be required to stop all production and sales for use in Minnesota, their largest markets. The result, in most cases, would be to make the use of such a packaging system so uneconomical that it would be a financial burden and have to be scrapped. The economic loss to those dairies would be substantial. With the loss of the economic advantage of an in-house packaging system, competition in interstate markets with out-of-state dairies using plastic containers would become difficult, if not economically unfeasible. On an intrastate basis, the marketing advantage of fruit juices and beverage containers sold in plastic containers will place local dairies at a further disadvantage.

Due to the long standing and wide spread use of plastic milk containers, the economic costs which would be incurred in changing from the plastic to the paperboard system on a statewide basis would be in excess of $5,000,000. The loss in interstate milk sales due to the handicap in competition with out-of-state dairies and the loss in intrastate milk sales to competition from other drinks would be certain, but are inestimable. The net effect on the Minnesota dairy industry, however, is to restrict its milk sales to the borders of the state.

If the ban on the sale of milk in plastic containers took effect at this time, a major portion of the Minnesota milk industry would be required to shut-down, greatly reducing the supply of milk to consumers. Over 50% of the milk now sold in Minnesota is in plastic gallon containers. The conversion from a plastic to a paperboard packaging system requires machinery retooling which can be expected to take from six to twelve months due primarily to the availability of parts. The ban would thus create an artificial milk shortage while the dairies converted their packaging systems.

With regard to the local benefits which may be obtained, those Minnesota dairies which use the plastic container system would return to the non-returnable, non-refillable paperboard carton which they had used before. Most dairies do not have the facilities to wash refillable bottles and regulatory restrictions on the sewage generated in bottle washing make it questionable that refillables could even be used if mandated on a statewide basis. (R. 424-425, 454-455.) The result is that paperboard containers will replace plastic containers in the market they have occupied throughout the State of Minnesota. Replacing a non-refillable, but recyclable plastic container with a non-returnable, non-refillable paperboard container is not, in our view, a local benefit. There is absolutely nothing about a ban on the sale of milk in plastic containers which encourages or in any way promotes the use of refillable containers and there appear to be no other legitimate local benefits.

CONCLUSION

In consideration of the foregoing reasons, we respectfully submit that the decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HANOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC. AND M-H PACKAGING SYSTEMS, INC.,

Respondents.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF *AMICUS CURIAE* BY THE SIERRA CLUB IN SUPPORT OF PETITIONER, THE STATE OF MINNESOTA

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BRIEF *AMICUS CURIAE* BY THE SIERRA CLUB IN SUPPORT OF PETITIONER, THE STATE OF MINNESOTA

INTEREST OF THE *AMICUS CURIAE*

The Sierra Club, a non-profit California corporation with its principal place of business in San Francisco, California, is a national conservation organization with about 180,000 members. The purposes of the Sierra Club are: to enhance and protect natural resources and the human environment of the United States and the earth in general; to explore, enjoy and preserve scenic resources of the United States and its natural areas; to undertake and

to publish scientific, literary and educational studies concerning them; to educate with respect to forests, parks, monuments and other natural resources; and to enlist public interest and cooperation in protecting them.

In Minnesota, the Sierra Club operates through its North Star Chapter, which has approximately 3,000 members. On both the national and the local levels, the Sierra Club has been actively involved in issues of energy conservation, resource depletion, and solid waste management. In Minnesota, the Sierra Club participated in the legislative processes leading to the enactment of Minnesota's packaging statute, MINN. STAT. § 116F.01 *et. seq.*, and then again participated as an *amicus curiae* in defense of the statute and the underlying regulations at both the trial court and Minnesota Supreme Court levels, *see Can Manufacturers Institute v. Minnesota,* 289 N.W. 2d 416 (Minn. 1979).

The Sierra Club strongly supports the use of returnable containers for food, beverages, and other items wherever feasible. The Sierra Club does not support the use of either non-returnable paper milk containers or non-returnable plastic milk containers.

STATEMENT OF THE CASE

As part of a broad statutory scheme addressing the solid waste management problem in the state, the Minnesota Legislature on May 26, 1977, enacted Minn. Laws 1977, ch. 268 [MINN. STAT. §§ 116F.21-.22 (Supp. 1977)]. The statute bans the sale of milk in non-returnable, non-refillable plastic containers. On September 29, 1977, the plaintiffs filed suit, claiming, *inter alia,* that

the statute was an unconstitutional denial of equal protection in violation of the Fourteenth Amendment. The trial court, upon lengthy analysis of the evidence, concluded that the statute was unconstitutional on that basis, as well as on other grounds. The Minnesota Supreme Court, following an appeal by the State, held, in *Clover Leaf Creamery Co v. Minnesota*, 289 N.W.2d 79 (1979), that the statute denied plaintiffs equal protection of the law. After a detailed review and analysis of the evidence, the court found that "paper containers are not environmentally superior to plastic nonrefillables," and that, therefore, the State interest in banning plastic containers was speculative and illusory. 289 N.W.2d at 86. The court confined itself to an equal protection analysis, specifically declining to rule on the plaintiffs' Commerce Clause challenge.

The State petitioned this Court for a Writ of Certiorari, which was granted March 31, 1980.

ARGUMENT

I.

IF THERE EXISTS A "CONCEIVABLE BASIS" UPON WHICH TO ASSUME THE RATIONALITY OF A STATUTE ADDRESSING AN ECONOMIC OR SOCIAL PROBLEM, THE STATUTE MUST BE UPHELD AGAINST AN EQUAL PROTECTION ATTACK.

To reach their decisions in the instant case, both the trial court and the Minnesota Supreme Court weighed the evidence (which compared non-returnable plastic containers with non-returnable paper-board containers), rejected portions of the evidence (such as the Midwest Research

Institute and United States Environmental Protection Agency reports), and then concluded that plastic milk containers were no worse than paper milk containers. Had those two courts been vested by the Minnesota electorate with legislative powers, it would have been within their domain to produce an enactment different than that embodied in MINN. STAT. §§ 116F.21-22. It is apparent that the two courts disagreed with the Legislature's judgment to ban plastic milk containers. However, fundamental concepts of separation of powers, judicial review, and equal protection prohibit these two lower courts from engaging in the superlegislative function which they have undertaken in this case.

First and foremost of these fundamental concepts is the statement of this Court in *New Orleans v. Dukes*, 472 U.S. 297, at 303 (1976):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, *our decisions presume the constitutionality of the statutory discriminations* and require only that the classification challenged be rationally related to a legitimate state interest. (Emphasis added.)

Accord, Mathews v. de Castro, 429 U.S. 181 (1976). This rule, with its long established application in the area of local economic regulation, recognizes, by its terms, that discriminations logically flow from much legislation. The issue then is not whether a discrimination between paper and plastic containers exists by virtue of the statute: the question is whether the singling out of plastic containers is rationally related to a legitimate state purpose. If so, it matters not that there is a discrimination.

There is no issue in this case with respect to the requisite legitimacy of the statute's purpose. The Minnesota Supreme Court, at 289 N.W.2d 82, stated, "the Act undoubtedly deals with legitimate state interests." The court acknowledged the legitimacy of the legislative attempt to reduce solid waste management problems, to reduce energy waste, and to preserve natural resources. The court also agreed with the legislative conclusion that refillable milk containers are clearly preferable given those legislative purposes. The difficulty in this case grows from the court's detailed comparison of the evils attributable to the plastic container versus the ills attributable to the paperboard container. In its opinion, the plastic containers were not less environmentally damaging than paper containers, and therefore could not be separately banned without violation of the Equal Protection Clause. It was upon this premise—that the plastic container is not the worse of the two—that the court decided there was no rational relationship between the means and the end, as set forth in the statute.

The course taken by the Minnesota Supreme Court in reaching this decision violates the basic propositions of equal protection analysis in these respects:

(a) the court failed to apply the "conceivable basis" test in deciding whether the ban rationally relates to the statutory purpose; and

(b) instead of so doing, the court overstepped its bounds by weighing the evidence and acting as a factfinder.

When presented with an equal protection attack upon a statute which regulates in the field of economic or so-

cial problems, a reviewing court must, in order to effectuate the strong presumption of constitutionality, search for any conceivable state of facts which would sustain the enactment, even if that state of facts must be assumed in order to do so. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Allied Stores, Inc. v. Bowers*, 358 U.S. 522 (1959); *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938); and *Lindsley v. Natural Carbonic Gas Co.*, 211 U.S. 61 (1911).

Although it is constitutionally necessary that the reviewing court search for this "conceivable" supporting basis, the Minnesota Supreme Court neglected to do so. Rather than assume facts in support of the statute's validity, the court assumed facts against its validity. For example, the court speculated that the total solid waste problem attributable to milk containers would never be solved because neither the state pollution control agency nor the state legislature could be said to have comprehensive programs in the offing. Based upon this speculation, the court further speculated that paper containers will continue to be used, and that therefore the ban on plastic containers is not rationally related to the purpose of the statute.

The court also noted that the original draft of the plastic ban contained a ban on paper containers as well, but that the latter was excised from the bill. This proves nothing. The proper application of the "conceivable basis" test suggests that the Legislature may have decided to wait until a later date to address the more complex problems of banning paper cartons. The Legislature may have considered issues such as greater potential job dislocation with a paper ban. Certainly, negative inferences which might vitiate the statute cannot permissibly be drawn from this observation by the court.

Such a process of speculation is exactly the reverse of what is required under economic equal protection analysis.

While engaging in this process, the court neglected to recognize several important considerations, at least hypothetical if not factual in nature, which might justify the Legislature's enactment. For instance, the court failed to take into account the fact that plastics are derived from petroleum and petroleum products, themselves non-renewable resources, while paper is derived from a renewable resource—trees. So in its conclusion that paper containers require more total energy for their production than plastic, the court failed to consider the possibility that the Legislature balanced the higher consumption of a renewable energy source against lower consumption of a non-renewable source, and decided in favor of the former. Reliance on energy from renewable biomass sources such as trees promotes the Legislatures' legitimate goal of reducing the depletion of non-renewable resources. Additionally, even if a ban on plastics will not increase the amount of natural gas or petroleum available for heating and fuel purposes, 289 N.W.2d at 85, it could conceivably reduce the total consumption of such resources. Reduced use of expensive fossil fuels is in keeping with the statute's purpose.

Furthermore, the Legislature might have found, based upon government studies, that the plastic containers were only recently introduced to the Minnesota market and, relatively speaking, had a lesser foothold in the marketplace than paper containers. With the comparative lesser degree of dependence (both by industry and consumers) on the plastic container, the Legislature might have con-

ceived that its prompt elimination from the market would be less disruptive than a later ban. As stated by Ms. Justice Wahl in her dissenting opinion, "The Legislature could rationally conclude that allowing the plastic non-refillables to become entrenched in Minnesota would hinder further efforts to force the dairy industry to utilize more environmentally acceptable containers." 289 N.W.2d at 87. In making its decision, the Legislature did remove at least one of several non-refillable, non-returnable containers from the waste stream, which is in accord with the statute's purpose. The fact that the two lower courts found the evidence to support the use of plastic over paper containers only signals the disagreement of those courts with the Legislature.

In so disagreeing, the lower courts have violated another tenet of judicial review when equal protection claims are asserted. Specifically, the courts have impermissibly re-weighed the evidence and analyzed the soundness of the legislative decision. This has consistently been construed as going beyond the "conceivable basis" decision. If there is any conceivably reasonable basis for the legislative decision, the reviewing court must stop there. Whether the court would have made the same decision on the same set of facts, had it been in the legislative role, is not the proper inquiry. If it is even "debatable" that the legislative decision can be justified, it must stand. "If our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, at 425 (1952). *Accord, Chem-Haulers, Inc. v. ICC,* 594 F.2d 166 (5th Cir. 1979), and *Independent Dairymen's Ass'n v. Denver,* 142 F.2d 940 (10th Cir. 1944).

In fact, it does not affect the constitutionality of the statute if the evidence of record suggests that the "ultimate efficacy" of achieving the statutory purpose is in question, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (challenged whether a proscription on oil producers and refiners owning gas stations would really foster sales competition); or that the means to achieve the statutory end is rough, illogical, or not the best available. *Dandridge v. Williams*, 397 U.S. 471 (1970) (challenged whether a $250 ceiling per family in AFDC payments was permissible regardless of family size or need); or that the means stated in the statute is not in all ways perfectly consistent with the desired result, *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (challenged whether a regulation on visual care in fact contributed to public health). It is evident from this mere sampling of cases that great latitude is permitted a legislative body in molding solutions to societal ills. The success of the program need not be guaranteed in advance.

If a court should sense that the evidence indicates potential failure of the program, that is an insufficient basis for overturning the legislation. A factual analysis of that nature is outside the parameters of equal protection analysis. In fact, this Court, in *New Orleans v. Dukes*, 472 U.S. 297 at 306, overruled *Morey v. Doud*, 354 U.S. 457 (1957), precisely because the Court there over-indulged in factfinding. In overruling it, this Court noted that *Morey* was "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds." *Id.* at 306.

This line of cases, which proscribes the exhaustive sort of evidentiary review which undergirds the Minnesota Su-

preme Court's opinion, derives largely from the theory of separation of powers. Deference to the legislative branch, and respect for the factual, political, and social complexities of the legislative process are fundamental

> Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates proper democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people.

AFL v. American Sash & Door Co., 335 U.S. 538, at 553 (1949), (J. Frankfurter, *concurring). See also McGinnis v. Royster,* 410 U.S. 263 at 277 (1973).

Second-guessing of the legislative branch by the judicial is improper in an equal protection case, and it is upon this reasoning and precedent that the ban against a court acting as a "superlegislature" is premised. Because the "superlegislative" role is the only conceivable means by which the Minnesota Supreme Court could have reached its decision below, that decision must be reversed.

II.

A LEGISLATIVE BODY MAY PERMISSIBLY SELECT FOR REGULATION ONE OF SEVERAL CONTRIBUTING EVILS TO A PROBLEM, WITHOUT VIOLATION OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

The opinion of the Minnesota Supreme Court indicates that the Legislature could not constitutionally ban plastic milk containers if it did not also ban paper milk containers. It specifically found that plastic containers are not environmentally more harmful than paper containers. This approach creates a serious question about the scope of legislative powers. Is a legislative body powerless to enact remedial measures in response to a given problem, if it does not simultaneously regulate all contributing causes of the problem? Is it powerless to regulate one known toxic effluent just because another such effluent is as yet unregulated? Must the legislative body of necessity engage in lengthy studies to scientifically ascertain which component of air pollution is most noxious before it may regulate any noxious components? Must it forego its regulation of uranium tailing deposits (*see* 42 U.S.C. §§ 7901-7942 (Supp. 1977)) because it has not yet spoken with respect to asbestos tailing deposits, when both are known health hazards? With such requirements, the flexibility essential to sound environmental legislation would be destroyed. Environmental regulation virtually always involves questions of economics and degrees of harm, and the balancing of one against the other. This complex, sensitive, and very political process is difficult enough when a single problem is in issue. To require that all evils contributing to a certain

environmental problem be regulated similarly and simultaneously would prove a straggering blow to the progress of economical, feasible, and sensible environmental lawmaking.

This Court has ruled repeatedly, and in a variety of economic equal protection cases, that the Equal Protection Clause does not require that "all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York,* 336 U.S. 106, at 110 (1949). In that case, in fact, the Court stated that one evil may be regulated even though a more serious evil goes unregulated. The regulation there in issue was a traffic rule that barred the use of space on a vehicle for advertising purposes, on the theory that such advertising was a distraction and road hazard. The rule excepted the owners of business delivery vehicles, who were permitted to use space on their own vehicles for their own advertising. The rule was upheld against an equal protection claim by a truck owner who sold advertising space on his trucks. The decision clearly permits a legislative body to proceed step-by-step to address a matter of concern, even if it does not address all, or even a large part, of the problem. The Court in *Railway Express* did not inquire, for example, whether and to what degree the travels of vehicles with rented advertising constituted a greater threat to traffic safety than the travels of vehicles carrying only their owners' advertising. Nor did the Court examine the entire problem of the distraction caused by advertisement, to determine whether the city had gone far enough in eliminating the threat to traffic safety by banning advertisement on vehicles alone, as opposed to that on billboards, walls, or other fixed objects. *Accord, Dandridge v. Williams,* 397 U.S. 471, at 486-87 (1970).

The constitutional question is not whether the regulation has struck at the worst evil, or whether it has filtered out all possible sources of the evil. *Mathews v. de Castro,* 429 U.S. 181, at 189 (1976); *United States v. Carolene Products, Co.,* 304 U.S. 144, at 151 (1938).

The extent to which a legislative body decides to address a problem, and the classifications it makes in reaching those decisions, are solely within the discretion of the Legislature, so long as they are rationally related to the resolution of the problem. A legislature may experiment if it wishes; it may decide on a gradual, incremental program; or it may decide on a wholesale program; it may decide to take on an evil of smaller magnitude than others to ascertain how the program functions; or it may decide to take on the larger evil, to create a more substantial impact. As the Court stated in *Day-Brite:*

> [S]tate legislatures have constitutional authority to experiment with new techniques: they are entitled to their own standard of the public welfare; they may within *extremely broad limits* control practices . . . so long as specific constitutional provisions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

342 U.S. at 423 (*emphasis added*).

In *Williamson,* it stated.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative

> mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

348 U.S. at 489 (citation omitted).

It is apparent in this case, by the nature of the problem itself, that the legislative approach was to take one step at a time. Reduction of the types and amounts of material entering the solid waste stream is a sizeable undertaking of questionable potential success in this modern disposable society. To focus first on businesses whose products find their way into a majority of American homes, and to discourage the deposit of those containers into the solid waste stream is certainly a logical beginning.

Markedly similar patterns have been upheld against equal protection attacks in the area of mandatory deposit regulations on beverage containers. The Oregon Court of Appeals, in *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973), acknowledged that the statute singled out beer and carbonated beverage containers, when myriad other beverage containers also added to the litter and solid waste problems of the state. Nevertheless, the court said, "The fact that other containers may also create litter and solid waste does not invalidate the legislature's intent to deal with this species of solid waste and litter." *Id.* at 704. Even more akin to the case at bar is *Anchor Hocking Glass Corp. v. Barber*, 118 Vt. 206, 105 A.2d 271 (1954). In that case, as in this, the legislative body attempted to get prompt regulatory control over a newly growing problem. There, the trend was an increase in the use of non-returnable beverage containers in the early 1950's, whereas here, the trend is toward a proportionate increase in the number

of dairies investing in plastic filler machinery along with the increasing purchases of milk in plastic non-refillable containers. In upholding the Vermont statute which banned the sale of beer in non-returnable glass containers, the Vermont Supreme Court took special note of the trend, and found that there was no denial of equal protection.

This same type of reasoning prevailed in *New Orleans v. Dukes*, where a grandfather clause, eliminating all but two street vendors from the French Quarter, was assailed on equal protection grounds. 427 U.S. 297 (1976). Even though the two vendors who were excused from operation of the ordinance were granted a monopoly of sorts, the Court noted that it was rationally permissible to eliminate vendors of more recent vintage. That was the case even though there was nothing of record to indicate that those two vendors would operate more consistently with the traditions of that unique part of New Orleans. So, even though the paper cartons may consume proportionately more of the market in Minnesota as a result of the Act, and even though they may be no better environmentally than the plastic cartons, this is insufficient to make out a denial of equal protection. The Minnesota Legislature's step-by-step approach of last-in, first-out was constitutionally sanctioned in *Dukes*, and that reasoning was an essential aspect of the *Dukes* holding. That same rationale is both sufficient and applicable, so that it may serve as the dispositive basis in this case.

By virtue of these authorities, and their application to this case, it is readily apparent that the Minnesota Legislature acted well within the confines of the equal protection doctrine when it chose to ban plastic non-refillable, non-returnable milk containers. It is clear that the exclu-

sion of paper-board milk containers from this ban is not reason enough to invalidate the environmentally sound step taken by the Legislature in its enactment of MINN. STAT. §§ 116F.21-22

CONCLUSION

Because the lower courts decided this case in the role of "superlegislatures," only after an exhaustive analysis and interpretation of the evidence, they failed to accord MINN. STAT. §§ 116F.21-22 the strong presumption of constitutionality owed it under the law. Because the statute can reasonably be viewed as an attempt to remove an environmentally objectionable and relatively new, non-returnable, non-refillable container from the marketplace before it became firmly entrenched, there is a conceivable basis upon which it must be sustained. This must be so even if the lower courts find that to be an unwise decision, an incomplete approach to the problem, or suspect it to be ultimately ineffectual.

The fact that paper non-returnable, non-refillable milk containers fall outside the ban does not protect the plastic containers against the decision of the Legislature. This is so because, under the law, the legislative branch is vested with broad-ranging authority to approach a problem, such as solid waste management, in any variety of ways. That the Minnesota Legislature chose to do so by the exclusion of a single product from the marketplace is not the equivalent of a denial of equal protection.

The Sierra Club, as *amicus curiae*, respectfully urges

the Court to reverse the holding of the Minnesota Supreme Court herein.

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No. 79-1171

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MINNESOTA, PETITIONER

v.

CLOVER LEAF CREAMERY CO., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a state ordinance banning the sale of milk products in nonreturnable, nonrefillable plastic containers violates the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

This case concerns the validity of a state statute banning the use of nonreturnable, nonrefillable plastic milk containers on the ground that such containers present a solid waste management problem, promote energy waste, and deplete natural resources. The interest of the United

States in solid waste management and energy and resource conservation is compelling. Energy conservation has been referred to by the President as the "cornerstone" of our national energy policy. President's Address to the nation, *The Energy Problem*, April 18, 1977, 13 Weekly Comp. of Pres. Doc. 560, 562, 563 (April 25, 1977).

Numerous federal statutes reflect the critical dimensions of the energy crisis and demonstrate the federal interest in eliminating energy waste and in promoting energy conservation. See, *e.g.*, National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 6344a, 6346, 6371 note, 6372 note, 8201, 8251, 8253, 8273; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. (Supp. II) 2601, 2611; Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. II) 8301; National Energy Extension Service Act, 42 U.S.C. (Supp. I) 7001; Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. 5551; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U.S.C. (Supp. II) 5581; Energy Conservation and Production Act, 42 U.S.C. (Supp. II) 6801, 6831; Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 753.[1] Many of the federal programs established by these statutes depend on state and local development, implementation, and enforcement efforts. See, *e.g.*, National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 8213–8215, 8218–8220 (state and residential energy conservation plans, nonregulated utility plans, and home heating supplier plans); Energy Policy and Conservation Act, 42 U.S.C. 6322, 6324, 6327 (state

[1] Several federal statutes emphasize the importance of the recovery of energy and materials from waste. See Resource Conservation and Recovery Act of 1976, 42 U.S.C. (and Supp. II) 6901; National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 8201; Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. (and Supp. II) 5901 *et seq.*

energy conservation plans); Energy Conservation and Production Act, 42 U.S.C. 6837 (grants to state to facilitate adoption and implementation of certain conservation measures); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. (Supp. II) 2621 (state utility regulatory agency must consider certain federal ratemaking standards based in part on energy efficiency and conservation). See also Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7321(a)(2) (national energy policy plan must consider views of state, regional, and local agencies).

The federal government often provides guidance and financial and technical assistance to state, regional and local agencies in dealing with solid waste management problems, particularly those relating to resource recovery and conservation. The federal policy, in significant part, is carried out through local planning and implementation efforts, including regulatory measures. See Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (and Supp. II) 6902(1), (8), 6941–6949; National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 8201; Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. (and Supp. II) 5901 *et seq.* (federal support for municipal waste reprocessing demonstration facilities). This type of statutory scheme means that state experimentation—like Minnesota's—with different methods of pursuing these objectives is central to the ability of the nation, as a whole, to develop energy efficient, environmentally acceptable solid waste management programs.

Moreover, Minnesota's ban on plastic milk containers is of concern to the United States because of the national policy mandating a decrease in dependence on nonrenewable resources such as oil and gas (needed to make plastic) in favor of the utilization of renewable resources such as

wood. The security of the nation—both military and economic—depends on our energy independence. The National Environmental Policy Act of 1969, 42 U.S.C. 4331–4332, requires the federal government to use "all practicable means" "to enhance the quality of renewable resources" and to implement its programs and direct its policies toward that end. The President has called for the nation to stop "our dependence on foreign oil dead in its tracks* * *." President's address to the nation, *Energy and National Goals*, July 15, 1979, 15 Weekly Comp. of Pres. Doc. 1235, 1239 (July 23, 1979). Numerous congressional findings and statutory purposes also address the need for decreased dependence on oil and gas. See Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. II) 8301(b)(1), (2), (3), (6); National Energy Conservation Policy Act, 42 U.S.C. (Supp. II) 6371 note, 6372 note, 8201(a), 8251; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. (Supp. II) 2601(4); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. 5551(a)(3), (4). These efforts, too, in large part rely on state government initiative and contribution.

In sum, a ruling by this Court striking down a state statute experimenting with solutions to the major national problems of waste disposal and energy conservation would be a significant setback to the federal government's efforts in these areas, and would render more difficult the efforts of the Environmental Protection Agency, the Department of Energy, and the Council on Environmental Quality to implement national energy and environmental policy.

STATEMENT

1. After concluding that the use of nonreturnable nonrefillable milk containers promotes energy waste, presents a solid waste management problem, and depletes natural

resources, the 1977 Session of the Minnesota Legislature enacted 1977 Minn. Laws, ch. 268 (Pet. 2), codified as Minn. Stat. §§ 116F.21, 116F.22 (West Supp. 1977). That statute banned the sale of nonreturnable, nonrefillable rigid or semi-rigid plastic milk containers (*id.* at § 116F.22(1)).[2] The legislation was designed to encourage the use of returnable, refillable containers (Pet. 2).

2. Respondents filed a complaint in Ramsey County District Court challenging the constitutionality of the Minnesota statute (A. 1–9).[2a] On April 5, 1978, after trial, the district court concluded that the statute deprived respondents of their constitutionally protected rights under the Commerce, Due Process and Equal Protection Clauses (Pet. App. A21). The Supreme Court of Minnesota affirmed the trial court's decision on equal protection grounds and did not reach the other issues (Pet. App. A1). The court concluded that the challenged statute, although purporting to further legitimate state interests, in fact created a classification not rationally related to those interests (Pet. App. A2–A3). The court's conclusion was based on two findings. First, the court found that the environmental effects of paper containers were no less harmful than the effects of plastic nonrefillable containers (Pet. App. A5). Second, the court found that the classification did not further the Act's goal of encouraging the use of refillable milk containers (*ibid.*)

In determining that the environmental effects of paper containers were no less harmful than those of plastic con-

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[2] The prohibition provides in full: "No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, nonrefillable, rigid or semi-rigid container at least 50 percent of which is plastic."

[2a] "A." refers to the Appendix to petitioner's brief in the Minnesota Supreme Court.

tainers, the court weighed a number of factors. It first considered the comparative effects of solid waste management; it noted that landfill is the major method of disposal of solid waste and that paper containers are bad for landfills since they decompose quickly, reducing landfill stability and producing leachates that drain into groundwater (Pet. App. A6). The court also considered the relative merits of the two materials for disposal by incineration, by recycling, and by source reduction and gave plastic a higher rating than paper in each category (*id.* at A9–A10). The court next found that paper containers are not superior to plastic nonrefillable containers in terms of energy waste (Pet. App. A10–A12). The court questioned the accuracy of the report prepared for the Environmental Protection Agency,[3] because the study had included in its calculations the energy value of wood waste, but not of the waste from the production of plastic (off-gases), and had allegedly overstated the average weight of plastic nonrefillable containers in Minnesota.

The court also concluded that the classification was not reasonably related to the legislature's stated goal of conserving natural resources, reasoning that the amount of oil and gas used in making plastic containers is quite small and their use is less likely to deplete natural resources than the use of paper containers, which are less recyclable (Pet. App. A12–A13). Although increased use of refillable milk containers would conserve natural resources, the court found no evidence that a ban on plastic containers would promote such an increase (*id.* at A13–A14). Finally, the court determined that the asserted state interest in stopping plastic containers from gaining a foothold in the

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[3] Resource and Environmental Profile Analysis of Five Milk Container Systems, prepared by the Midwest Research Institute. See Pet. App. A7 n.11.

market was "speculative and illusory" in the absence of evidence of any current state plans for more comprehensive regulations in this area (Pet. App. A15). In sum, the court stated that while it is true that a legislature may attempt to eradicate one evil at a time without affronting equal protection guarantees, the initial step must have a rational relationship to a legitimate state interest, and this ban did not (Pet. App. A15–A16).

Justice Wahl dissented, although he agreed that the evidence indicated that plastic nonrefillable containers are no worse environmentally than paper containers. He concluded that *New Orleans* v. *Dukes*, 427 U.S. 297 (1976), required the conclusion that the ban on plastic containers was a constitutionally permissible "first step" by the legislature (Pet. App. A18).[4]

SUMMARY OF ARGUMENT

The Minnesota Supreme Court's detailed inquiry into the logical and factual basis of the statutory ban was improper. This Court has long since rejected that degree of judicial scrutiny of state and local economic legislation challenged under the Equal Protection Clause of the Fourteenth Amendment. In considering the relative merits of plastic and paper containers the court, in effect, acted as a "super-legislature" (see *Shapiro* v. *Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)) and made assumptions that impermissibly intruded into the realm of legislative decision-making. The courts below made findings concerning relevant facts that were inconsistent with the findings reasonably made by the state legislature. Furthermore, the courts' conclusions concerning the relative

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[4] Justice Wahl also rejected respondent's argument that the statute violated the Commerce Clause or Due Process requirements (Pet. App. A20).

merits of the two materials were insufficient to justify a ruling that the ban on nonreturnable, nonrefillable plastic milk containers was unconstitutional. Even if it were true that plastic is no worse environmentally than paper, the state could constitutionally limit its ban to plastic containers. That would be a proper initial measure. In addition, the Minnesota courts failed to give sufficient weight to the need to utilize renewable resources, such as wood, whenever feasible as a substitute for nonrenewable resources, such as fossil fuels (particularly imported oil and gas). This factor, alone, is sufficient under the Constitution to justify the legislative distinction between plastic and paper containers.

ARGUMENT

THE STATE OF MINNESOTA'S BAN ON NONRETURNABLE NONREFILLABLE PLASTIC MILK CONTAINERS DOES NOT OFFEND THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT

As Mr. Justice Brandeis stated in dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), "[i]t is one of the happy incidents of the federal system that a single courageous State may * * * try novel social and economic experiments." To reap the full advantage of this "happy incident," the states must be afforded wide leeway in developing alternative approaches to complex and difficult problems. Cf. *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978). Here the State of Minnesota addressed the complex problems of solid waste management, energy waste, and resource depletion—intractable problems for which state experimentation is essential.[5] It is to be expected that such state experimentation will often begin

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[5] State regulation of beverage containers, in particular, is a relatively new phenomenon and states are experimenting with many dif-

with laws that are underinclusive or contain "loopholes." It is precisely in dealing with such problems that the state legislature must proceed by stages, evaluating the effectiveness of the initial legislation before deciding on the next step. Even if the first steps involve underinclusive laws, they do not, for that reason, violate any equal pro-

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ferent types of programs. Reduction of garbage and litter and conservation of energy and raw material are goals of these programs. Different types of programs include (1) mandatory deposits on beverage containers (equivalent to a ban on nonreturnable containers), see, *e.g.*, Conn. Gen. Stat. Ann. § 22a-78 (West Supp. 1980); Del. Code Ann. tit. 7, § 6054 (Supp. 1978); Iowa Code Ann. § 455C (West Supp. 1980); Me. Rev. Stat. Ann. tit. 32, § 1863 (Supp. 1979); Mich. Stat. Ann. § 18.1206(12) (Supp. 1979); Ore. Rev. Stat. § 459.820 (1979); Vt. Stat. Ann. tit. 10, § 1522 (Supp. 1977); (2) taxes on products likely to end up as litter, see, *e.g.*, Cal. Rev. & Tax Code § 42000 *et seq.* (West 1979); Colo. Rev. Stat. § 24-32-1001 (Supp. 1978); Conn. Gen. Stat. Ann. § 22a-84 (West Supp. 1980); Ky. Rev. Stat. § 224.955 (Supp. 1978); Vt. Stat. Ann. tit. 10, § 1522a (Supp. 1977); Va. Code § 10-201.1 (1978); Wash. Rev. Code §§ 70.93.120, 70.93.130 (1975); and (3) bans on specific types of containers, see, *e.g.*, Del. Code Ann. tit. 7, § 6059 (Supp. 1978) (ban on nonrefillable glass beverage containers); Iowa Code Ann. § 455C.8 (West Supp. 1980) (prohibition of metal beverage containers with detachable parts (*i.e.*, "pull tab" containers)); Me. Rev. Stat. Ann. tit. 32, § 1868 (Supp. 1979) (ban on pull tab metal beverage containers and plastic retainer rings); Mass. Gen. Laws Ann. ch. 94, § 319 (West Supp. 1980) (ban on pull tab metal beverage containers); Mich. Stat. Ann. § 18.1206(12) (Supp. 1979) (ban on pull tab metal beverage containers); Minn. Stat. Ann. § 325.248 (West Supp. 1980) (ban on pull tab metal containers for carbonated soft drink, beer, other malt beverage or tea in liquid form; see also Minn. Op. Att'y Gen. 135b-6a (Jan. 25, 1979) (pull tab prohibition applies to all metal beverage containers)); Ore. Rev. Stat. § 459.850(3), (4), (5) (1979) (ban on pull tab beverage containers and nonbiodegradable holding devices); S.C. Code § 39-17-410 (Supp. 1979) (ban on pull tab metal containers for carbonated soft drink or malt beverages); S.D. Codified Laws Ann. § 34A-7-5 (1977) (ban on nonreusable, nonrecyclable, and nonbiodegradable containers); Vt. Stat. Ann. tit. 10, § 1525 (Supp. 1977), as amended by An Act Relating to the Sale of Beverage Containers, 1979 Vt. Acts No. 63, § 1 (enacted April 27, 1979) (ban on nonrefillable glass beverage containers, on beverage containers with detachable parts other than a piece of pressure sensitive tape and on nonbiodegradable (plastic) holding devices).

tection guarantees of the Fourteenth Amendment. See A. Bickel, *The Least Dangerous Branch* 225–226 (1962).

It is settled that a "State [is] not bound to deal alike with all * * * classes, or to strike at all evils at the same time or the same way." *Semler* v. *Dental Examiners*, 294 U.S. 608, 610 (1935). See *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 303, 305–306. Thus, this Court has upheld a prohibition against some, but not all, milk product substitutes, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 151 (1938); a partial ban on vehicular advertising, *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949); and a regulation covering some, but not all, eyeglass sellers, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

Despite this settled line of precedents, the Minnesota Supreme Court struck down Minnesota's ban on milk containers because it failed to prohibit both plastic and paper nonreturnable, nonrefillable containers. The court apparently based its invalidation of the plastic milk container ban on the assumption that all those persons who would have bought plastic milk containers would buy nonreturnable paper containers if the plastic containers were banned; consequently, there would be no net positive impact from the ban if plastic is no worse than paper (Pet. App. A13–A14). But this assumption on the part of the court below—that the plastic and paper containers are, in effect, perfect economic substitutes for each other—is inappropriate: the legislature could reasonably have reached a different conclusion. Indeed, the Minnesota legislature evidently concluded that the initial step of a ban on certain plastic milk containers would begin to address the problems of solid waste management, energy waste, and resource depletion. Without a doubt, the consumer and manufacturer response to the ban will provide more in-

formation, upon which the legislature may rely in formulating its next response to these complex problems.[6] The Minnesota court's predictions concerning the result of the ban and its bland assumption that convenience will always be the predominant factor in consumer choice (Pet. App. A13–A14) is a poor substitute for this empirical evidence. It is also a judicial intrusion into the ongoing legislative decision-making process that is not condoned by the Equal Protection Clause of the Fourteenth Amendment.

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[6] Vermont, which enacted one of the first beverage container laws, illustrates this process. See, generally, J. Jeffords & D. Webster, *Vermont 5 Cent Deposit* (Nov. 1977) reprinted in *Mandatory Deposits on Beverage Containers—Oversight Hearing Before the Subcomm. on Transportation* and *Commerce of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 12–28 (1978) (statement of Rep. Jeffords (Vt.)). In 1953, Vermont adopted the first mandatory beverage container deposit law in the nation (*id.* at 12). That law prohibited only the sale of beer or ale in nonreturnable glass containers and in 1954 was upheld as constitutional by the Vermont Supreme Court. See *Anchor Hocking Glass Corp.* v. *Barber*, 118 Vt. 206, 105 A. 2d 271 (1954). After concluding that a more effective law was necessary, the legislature passed a more comprehensive deposit law in 1972. That law applied to both beer and soft drink and to all types of containers. See J. Jeffords & D. Webster, *Vermont 5 Cent Deposit, supra*, at 14. The new deposit law, however, did not become effective until September 1, 1973; a litter tax on nonreturnable containers was imposed as an interim measure, in part to determine if a stricter measure such as a ban was really necessary (*id.* at 13–14). As it turned out, the tax was not sufficient and the comprehensive deposit program became effective in 1973. Indeed, even the more comprehensive deposit law failed to have a substantial impact because of industry resistance (*id.* at 14.). The use of refillable beer bottles was not mandated and that type of container remained virtually non-existent (*ibid.*). Consequently, in 1975, the legislature passed a package of amendments designed to strengthen the then existing law. These amendments included a prohibition on nonrefillable glass beverage containers as well as a prohibition on pull tab beverage containers and on plastic loop retainers. See Vt. Stat. Ann. tit. 10, § 1525 (Supp. 1977).

A. The Minnesota Supreme Court Improperly Questioned The Wisdom Of Minnesota's Ban On Plastic Milk Containers

Although purporting to recognize "the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds" (Pet. App. A5), the court below in fact conducted an analysis much more akin to the strict scrutiny standard applied to classifications based on suspect criteria such as race, or those that trench on certain fundamental constitutional rights such as voting and free speech.

The statute challenged in this action involves local economic regulation; it simply restricts certain commercial activity. The standard of judicial review of such regulations was reiterated by this Court in *New Orleans* v. *Dukes*, 427 U.S. 297, 303–304 (1976) (per curiam):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. *See, e.g. Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488–489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in

> areas that neither affect fundamental rights nor proceed along suspect lines, *see, e.g., Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

In cases like this one, where there is no allegation of invidious discrimination, the statute is entitled to a strong presumption of validity. Only if the statutory classification is "wholly irrelevant," *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961) (Sunday ban on certain commercial activity upheld); *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (state police jurisdictional statutes upheld), and the reviewing court can only conclude that the classification is totally irrational, may the court strike down the statute on equal protection grounds. See, *e.g., Lewis* v. *United States*, No. 78–1595 (Feb. 27, 1980), slip op. 10; *Barry* v. *Barchi*, 443 U.S. 55, 67 (1979); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Whitney* v. *California*, 274 U.S. 357, 369 (1927).[7]

One aspect of the presumption of legislative validity is the settled principle that a reviewing court may conduct only a limited inquiry into the factual bases of the statute. Because a legislative factual determination is presumed valid, the challenger, to be successful, must show not that his facts are more likely to be true than those relied upon by the legislature, but that the legislature's facts could not reasonably be conceived to be true. See L. Tribe, *American Constitutional Law* § 16–3 (1978) ("the conceivable

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[7] In only one case (*Morey* v. *Doud*, 354 U.S. 457 (1957)) during the last fifty years has this Court invalidated an economic regulation under the Equal Protection Clause, and it has recently characterized that decision as "erroneous." See *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 306.

basis test"). In *Vance* v. *Bradley*, 440 U.S. 93, 110–111 (1979) the Court commented,

> [T]his case, as equal protection cases recurringly do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker. [Citation omitted.]

Therefore, if a state statute serves a legitimate state purpose, and if the means the state adopted are rationally related to the achievement of that purpose, the statute will withstand scrutiny under the Equal Protection Clause as long as the factual assumptions on which the means are predicated can reasonably be conceived to be true.[8]

The courts below departed from these principles. Instead of attempting to determine what the legislature

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[8] This Court has recognized the propriety of regulating container types to further legitimate public purposes and the great deference that should be accorded a government determination that the use of certain container types is in the public interest. In *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176 (1935), the Court upheld an administrative order prescribing containers for raspberries and strawberries that allegedly excluded use of a container manufactured by plaintiffs. Justice Brandeis, writing for the Court, pointed out the many conceivable reasons for requiring a certain type of container and commented (*id.* at 182):

> [A]s to each commodity there may be reasonable differences of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government * * *. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious.

could have conceived to be true or reasonably believed to be true, they relied on their own conclusions regarding what was likely to be true (*e.g.*, Pet. App. A8, A10–A11, A31; cf. Br. in Opp. 4–5), recognizing that this required the evaluation of conflicting evidence (Pet. App. A7–A8; A10, A31). Both courts below thus confused the normal judicial fact-finding role with proper equal protection analysis,[9] contrary to this Court's explicit teachings in *Vance* v. *Bradley*, *supra*, 440 U.S. at 111, quoting *Firemen* v. *Chicago, R. I. & P. R.R.*, 393 U.S. 129, 138–139 (1968):

> The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.'

For example, the legislature certainly could reasonably believe that a ban on one type of nonreturnable container would be likely to promote the use of returnable containers, and that plastic containers did not yet have a solid foothold in the market. But see Pet. App. A13–A14. Most clearly, the legislature, not the reviewing court, is in the best position to know if this statute is just an initial step which, if successfully taken, is likely to lead to additional legislative measures to promote the use of returnable containers. But see Pet. App. A15.

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[9] The District Court of Ramsey County believed that "as fact-finder, [it was] obliged to weigh and evaluate [the] evidence, much of which is in sharp conflict" (Pet. App. A31). The Minnesota Supreme Court "[b]ased [its conclusion] upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources" (Pet. App. A5).

In considering the relative merits of the two materials (plastic and paper), the reviewing court similarly disputed factual details relevant to the legislative judgment and thereby exceeded the bounds of proper judicial review of the statute. That there was evidence that paper decomposed and might pollute groundwater, that plastic might not occupy more space than paper, or that plastic containers might weigh less on the average than the legislature concluded, were all considerations in the Minnesota Supreme Court's inquiry (Pet. App. A6–A8, A11). None of them should have been. "[I]t is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute." *Vance* v. *Bradley*, *supra*, 440 U.S. at 112; *Henderson Co.* v. *Thompson*, 300 U.S. 258, 264–265 (1937); *Radice* v. *New York*, 264 U.S. 292, 294 (1924).

Finally, in determining that plastic containers posed no more threat than paper ones to the announced state goals of improving solid waste management, minimizing resource depletion, and controlling energy waste, the Minnesota court impermissibly intruded into the realm of legislative decisionmaking by judging the wisdom of the legislative act. The Minnesota court found that since plastic can be returned and ground up, it therefore is recyclable and less likely than paper to deplete natural resources (Pet. App. A9, A13). But, in making such a judgment, the court necessarily assumed that the legislature could not reasonably have found that the process of returning and grinding plastic milk containers is not, in fact, occurring. Similarly, the court below concluded that if one considered the energy value of the off-gases from the fabrication of plastic, plastic was no worse in terms of energy waste than paper (Pet. App. A11–A12). But again, that assumes that those off-gases are, in fact, being captured

efficiently and being converted to useful energy. The legislature could reasonably have believed that this capture was not now occurring and would not occur without a statutory requirement.[10]

In sum, the Minnesota Supreme Court found the statute to be irrational only after improperly questioning its factual basis, resolving debatable issues in favor of those challenging the statute, and assuming facts to be true that the legislature could reasonably have conceived to be otherwise. The Equal Protection Clause was not meant to be used in such a fashion to strike down economic regulation.

B. Adequate Considerations Support Minnesota's Statutory Classification

The Minnesota Supreme Court's analysis of the ban is itself defective. In challenging the detailed bases of the statute, the court failed to focus on much broader considerations that justify the statutory distinction between paper and plastic containers. A statutory classification that appears to be underinclusive when viewed solely in terms of a single legislative objective, may instead be the result of an entirely rational legislative effort to achieve more than one objective simultaneously. See L. Tribe, *American Constitutional Law* § 16–4 (1978).

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[10] Of course, the legislature could have required that all plastic milk containers be returned, and that the manufacturers must grind them up and ensure that they are reused; it chose to ban the nonrefillable plastic container, rather than to require its return. The state has wide discretion in determining which measures to enact; that a reviewing court may perceive better or alternative ways to pursue legitimate state objectives is totally irrelevant. *Holt Civic Club* v. *City of Tuscaloosa*, *supra*, 439 U.S. at 73–74; *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 303; *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179, 186 (1950). The legislature was clearly within bounds in not assuming that either total recycling of plastic or complete capture of off-gases would occur and in enacting the ban instead.

1. *Banning the newest entry into a market is a legitimate first step toward restructuring the market into a more ecologically sound system.*

It is clear from the legislative history of the statute[11] that one reason the Minnesota Legislature singled out nonreturnable, nonrefillable *plastic* containers was that they were just coming into the market; there was no widespread use of them and few dairies had as yet converted to that system. As Representative Munger stated during debate on the bill on March 10, 1977, in the Minnesota State House of Representatives: "I think it is time to act on this legislation now. Minnesota's dairy market is on the verge of making a major change over from essentially a paperboard container system to a system of primarily single use, throwaway plastic bottles" (P. Ex. J at 1). And in the Senate debate, May 20, 1977, Senator Perpich warned that if the Legislature did not act immediately, there would be so many jobs involved in producing the plastic containers that it would be politically impossible to pass such a bill (P. Ex. J at 10). Senator Luther stated clearly that the ban on the emerging use of nonreturnable plastic milk containers was a necessary first step in converting to a better system (P. Ex. J at 2):

> "I want to point out that clearly the most preferable container system would be a returnable container system for milk delivery * * *. It would be extremely difficult for us to switch back to a refillable system once [the] conversion to a throwaway plastic is made * * *. [I]t makes absolutely no sense for us to stand by and permit this delivery system to go into another nonreturnable system * * *. The issue before us is whether we should get into another throwaway

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[11] Although the legislative debates are not officially reported, respondents introduced at trial their own transcript of the debates on the container bill. This transcript is cited as P. Ex. J.

plastic system that will be very, very difficult to convert from.

This Court has recognized the propriety of such legislative considerations. In *New Orleans* v. *Dukes*, *supra*, 427 U.S. at 305, the Court upheld New Orleans' prohibition of any new pushcart vendors in the French Quarter of the city while exempting the vendors who were already there: "[R]ather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible.* * * The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests * * *. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection." Banning plastic containers—the more recent entrant in the nonreturnable, nonrefillable container market — was similarly a constitutionally permissible first step.[12]

2. *The paramount need to halt the depletion of nonrenewable natural resources and to reduce our nation's dependence on foreign energy resources justifies banning plastic containers.*

Plastic is made from oil and gas, nonrenewable resources for which the nation is greatly dependent on unre-

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[12] If such considerations were not legitimate, a state legislature could find itself in a veritable constitutional "Catch-22". If the state tried to stop an enterprise contrary to the public interest in its incipiency it would be subject to attack under the Equal Protection Clause, but if it waited until the business grew and substantial investment had been made, it might be found to be susceptible to a challenge under the Takings Clause. See *Kaiser Aetna* v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 10; *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (emphasizing significance of "distinct, investment-backed expectations").

liable foreign sources, while paper is made from woodpulp, a renewable resource that the nation possesses in abundance. The national interest in utilizing renewable resources rather than nonrenewable resources, whenever feasible, is clear. 42 U.S.C. 4331–4332; 42 U.S.C. 5904. Although plastic can be ground up and recycled, no recycling processes are 100 percent efficient, and the creation of new plastic containers requires continuing dependence on nonrenewable resources.

The nation must try to eliminate in every possible manner any unnecessary use of oil and gas. Unnecessary utilization of these energy resources increases our reliance on foreign imports and thereby constitutes a threat to our national security. It is irrelevant that the waste involved in any one instance consumes only a relatively small amount of oil and gas; any waste may be lawfully prohibited. The need is paramount. See, *e.g.*, President's Address to the nation, *Energy and National Goals*, July 15, 1979, 15 Weekly Comp. of Pres. Doc. 1235, 1239 (July 23, 1979); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. II) 8301(b)(1), (2), (3), (6). Moreover, stopping this wasteful use of plastic now, when only small amounts are used for milk containers, will ensure that large amounts are not used in the future.

This Court has upheld state police measures prohibiting wasteful uses of scarce energy resources such as oil and gas. See, *e.g.*, *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 324 (1920). Moreover, equal protection attacks on state attempts to prevent wasteful uses of energy resources have been repeatedly rejected. See *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179, 185 (1950) ("It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas."); *Henderson Co.* v. *Thompson*, 300 U.S. 258, 267 (1937)

("The Legislature may, for the purpose of conserving natural resources, regulate their production and use"). Wood pulp can be used instead of oil and gas to make milk containers. Therefore, using oil and gas to make plastic for those containers is a wasteful use of a scarce resource. That is, by itself, a sufficient reason to conclude that the statutory classification satisfies the requirements of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of Minnesota should be reversed.

Respectfully submitted.

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